DOCKET

No. 88-421-ASX
Status: DECIDED

Title: Ashland Oil, Inc., Petitioner
v.
Herschel H. Rose, III, etc., et al.

Docketed:
September 9, 1988

Court: Kanawha County Circuit Court of
West Virginia

Counsel for appellant: Dailey,Richard R.

Counsel for appellee: Morgan,Gregry A.

Entry	Date	Note	Proceedings and Orders
1	Sep 9 1988	G	Statement as to jurisdiction filed.
3	Sep 30 1988		Order extending time to file response to jurisdictional statement until November 4, 1988.
4	Nov 4 1988	G	Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as amicus curiae filed.
5	Nov 4 1988		Motion of appellee Herschel H. Rose, III to dismiss or affirm filed.
6	Nov 8 1988		DISTRIBUTED. November 23, 1988
7	Nov 12 1988	X	Reply brief of appellant Ashland Oil, Inc. filed.
8	Nov 17 1988	X	Supplemental brief of appellant Ashland Oil, Inc. filed.
9	Jun 23 1989		REDISTRIBUTED. June 29, 1989
10	Jun 1 1990		REDISTRIBUTED. June 7, 1990
12	Jun 8 1990		REDISTRIBUTED. June 14, 1990
14	Jun 15 1990		REDISTRIBUTED. June 21, 1990
16	Jun 22 1990		REDISTRIBUTED. June 27, 1990
17	Jun 28 1990		Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as amicus curiae GRANTED.
18	Jun 28 1990		Judgment REVERSED and case REMANDED Opinion per curiam.

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JURISDICTIONAL

STATEMENT

(1) 88-421

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASHLAND OIL, INC.,

Appellant,

—v.—

HERSCHEL H. ROSE, III, West Virginia State Tax Commissioner and the West Virginia State Tax Department,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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September 9, 1988

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QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the West Virginia State Tax Commissioner is constitutionally precluded, without regard to the civil retroactivity standards set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), from enforcing collection of a State tax after the State taxing statute has been found by this Court to violate the Commerce Clause.

2. If the State Tax Commissioner is not so constitutionally precluded, whether the *Chevron Oil* standards of civil retroactivity authorize collection of the State tax.

3. Whether the imposition of a State tax on gross receipts derived from sales transactions lacking substantial nexus with the taxing State violates the Due Process Clause and the Commerce Clause.

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JURISDICTIONAL STATEMENT

Appellant, Ashland Oil, Inc. ("Ashland"), appeals from the final judgment of the Circuit Court of Kanawha County, West Virginia ("Circuit Court"), which was entered on remand from the Supreme Court of Appeals of West Virginia ("Court of Appeals"). The Court of Appeals had held that this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), did not preclude the West Virginia State Tax Commissioner from collecting from Ashland the West Virginia business and occupation tax, and had remanded the case to the Circuit Court for consideration of Ashland's further argument that sufficient nexus did not exist to allow the State of West Virginia constitutionally to tax the transactions in question. On remand the Circuit Court concluded that sufficient nexus did exist, and the

Court of Appeals declined to review that decision. The prior decision of the Court of Appeals is subsumed in this appeal. *See Urie v. Thompson*, 337 U.S. 163 (1949).

A designation of Corporate Relationships pertaining to Ashland is, pursuant to Rule 28.1, found at Appendix I.

OPINIONS AND ORDERS INVOLVED

The opinions and orders embodied in this appeal are, in chronological order:

(i) The unreported administrative decision of the Tax Department of West Virginia upholding the assessments of tax against Ashland (Appendix F);

(ii) the unreported order of the Circuit Court reversing that administrative decision and granting summary judgment for Ashland (Appendix E);

(iii) the opinion and order of the Court of Appeals, 350 S.E.2d 531 (W. Va. 1986), reversing the Circuit Court's grant of summary judgment and remanding the case to the Circuit Court (Appendix D);

(iv) the order of this Court, 107 S. Ct. 1949 (1987), dismissing the appeal by Ashland from the opinion and order of the Court of Appeals for want of a final judgment below (Appendix C);

(v) the unreported opinion and order of the Circuit Court on remand, from which this appeal is taken, upholding the assessments of tax against Ashland (Appendix A); and

(vi) the unreported order of the Court of Appeals declining review of the opinion of the Circuit Court (Appendix B).

JURISDICTION

By order entered June 15, 1988 the Court of Appeals declined review of the opinion and final order of the Circuit Court which had been rendered on January 12, 1988. App. 10a. The opinion and final order of the Circuit Court therefore became a final judgment on June 15, 1988 for purposes of 28 U.S.C. § 1257. *See American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

A Notice of Appeal was filed in the Circuit Court on August 3, 1988. App. 50a. The time within which to docket this appeal expires on September 13, 1988, and timely docketing has been made. Because the decision of the Circuit Court upholds the application of a state statute against a challenge under the United States Constitution, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (art. I, § 8, cl. 3), Supremacy Clause (art. VI) and Due Process Clause (amend. XIV) of the United States Constitution.

West Virginia Code, §§ 11-10-8(a), (b) (1986); 11-10-9 (1978); 11-10-10(a) (1978).

These constitutional and statutory provisions are reproduced in pertinent part at Appendix H.

STATEMENT OF THE CASE

During the years involved here, West Virginia imposed a business and occupation tax upon the gross receipts realized from wholesale sales of tangible property by persons engaging in or continuing within the State the business of selling tangible property. In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), *rev'g* 303 S.E.2d 706 (W. Va. 1983), *reh'g denied*, 469 U.S. 912 (1984), this Court determined that this West Virginia wholesale gross receipts tax discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution.

This appeal challenges the endorsements by the courts below of the West Virginia State Tax Commissioner's continuing attempt, notwithstanding this Court's decision in the *Armco* case, to collect from Ashland $181,313.22 in wholesale gross receipts taxes attributable to Ashland's fiscal years ending September 30, 1975 and 1976. Ashland bases its challenge on two independent grounds. First, Ashland maintains that this Court's determination in the *Armco* case that the wholesale gross receipts tax violated the Constitution precludes the West Virginia State Tax Commissioner from continuing his efforts to collect the tax. And second, even if this Court's decision in *Armco* does not preclude collection of the tax, Ashland submits that the West Virginia wholesale gross receipts tax may not constitutionally be applied to the sales at issue because no substantial nexus existed between West Virginia and those sales.

Chronology of the Case

Events culminating in this appeal commenced in 1977 when the West Virginia State Tax Commissioner issued separate notices of assessment against Armco Inc. ("Armco") and Ashland, asserting in each instance deficiencies in business and occupation tax as a result of wholesale sales made by both taxpayers to residents of West Virginia. Armco and Ashland appealed these notices before the Tax Department of West Virginia, both taxpayers claiming that imposition of the tax would contravene the United States Constitution, and in each administrative proceeding the Tax Department upheld the imposition of the tax. App. 29a; Jurisdictional Statement of Appellant at App. 37a, *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984).

Armco and Ashland each appealed the adverse determination of the Tax Department to the Circuit Court. Because of evidentiary delays in the Ashland proceeding at the administrative level, the Armco appeal was heard first, and on July 30, 1981 the Circuit Court reversed the decision of the Tax Department on the ground that there had been insufficient nexus between West Virginia and the Armco sales in question. Jurisdictional Statement of Appellant at App. 37a, *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984).

The Tax Commissioner appealed the decision of the Circuit Court in the *Armco* case to the Court of Appeals, and while that appeal was pending the *Ashland* case was argued and submitted to the Circuit Court for decision. The parties, however, agreed with the Circuit Court that disposition of the *Ashland* case should await the decision of the Court of Appeals, and subsequently the decision of this Court, in the *Armco* case.

On May 25, 1983 the Court of Appeals reversed the Circuit Court in *Armco*, finding that under a "unitary business" theory Armco had a sufficient nexus with West Virginia to permit taxation of the sales there in question, and that the business and occupation tax did not discriminate against interstate commerce. 303 S.E.2d 706 (1983). Armco then appealed to this Court, and on June 12, 1984 this Court held that the West Virginia tax impermissibly discriminated against interstate commerce. 467 U.S. 638 (1984). Accordingly, this Court did not reach the nexus issue raised in the *Armco* case.

Subsequent to June 12, 1984, the West Virginia State Tax Commissioner filed a Petition for Rehearing, asking this Court to determine (i) that the *Armco* decision should be applied prospectively only with respect to all West Virginia taxpayers other than Armco, or, alternatively, (ii) that the *Armco* case should be remanded to the West Virginia courts for a determination of prospective or retroactive application. This Court denied the Petition for Rehearing on October 9, 1984. 469 U.S. 912 (1984). Following that denial, Ashland moved for summary judgment in the Circuit Court based upon the final outcome of the *Armco* case in this Court, and the Circuit Court granted that motion. App. 25a.

The Tax Commissioner then appealed the decision of the Circuit Court in *Ashland* to the Court of Appeals, and on November 12, 1986 the Court of Appeals reversed the Circuit Court. It held that the *Armco* decision should be applied "prospectively" rather than "retroactively," and concluded from this that the State Tax Commissioner is not precluded from enforcing collection of the tax previously declared unconstitutional by this Court. App. 12a. The Court of Appeals rejected Ashland's claim that *Armco* precludes collection of the tax without regard

to the retroactivity analysis, and remanded the case to the Circuit Court for a consideration of Ashland's nexus argument.

Concerned that the November 12, 1986 decision of the Court of Appeals might be a final judgment under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), Ashland appealed that decision to this Court, but on April 27, 1987 this Court dismissed the appeal for want of a final judgment below. App. 11a. Accordingly, the *Ashland* case returned to the Circuit Court for resolution of the nexus issue. On January 12, 1988, the Circuit Court, applying the "unitary business" test adopted by the Court of Appeals in the *Armco* case, held that Ashland was a unitary business operating in West Virginia and, consequently, that a sufficient nexus with West Virginia existed so that the gross receipts tax could be imposed on the sales at issue, despite the fact that the parties had stipulated that these sales were unrelated to Ashland's West Virginia business activities. App. 1a.

Ashland then requested the Court of Appeals to review the nexus decision of the Circuit Court, an appeal process which under West Virginia law was within the discretion of the Court of Appeals. On June 15, 1988 the Court of Appeals denied Ashland's request, App. 10a, and this appeal from the final judgment of the Circuit Court followed.

The Sales Transactions Involved

Ashland is a Kentucky corporation with its principal offices in Ashland, Kentucky. During the years involved here Ashland was engaged in West Virginia in the businesses of producing gas and other natural resources, manufacturing, making retail and wholesale sales, and conducting service and rental activities. No issue is presented on this appeal with respect to the West Virginia taxes imposed upon these business activities which occurred in West Virginia. The controversy presented relates solely to Ashland's wholesale sales of goods manufactured outside West Virginia and shipped to customers within the State. The parties have stipulated that these sales were unrelated to any of Ashland's business activities which occurred in West Virginia. App. 2a, 35a-37a.

The parties have also stipulated that, with respect to a substantial number of the sales at issue, no contacts with West Virginia existed other than the fact that the purchaser resided in the State. App. 2a, 35a-37a. These sales were not facilitated by any office, agency or place of business maintained by Ashland in West Virginia and no solicitation or acceptance of orders occurred in West Virginia. Delivery of these items was by common carrier from inventory located outside West Virginia and no local advertising was done; nor was marketing assistance, advertising assistance or technical advice rendered with respect to the products which were the subject of these sales. No salesman who participated in these sales resided in West Virginia, and neither Ashland nor its representatives performed any post-delivery services with respect to these products. With respect to certain other sales at issue, the parties have stipulated that limited West Virginia contacts did exist, consisting of one or more of the following: (i) limited solicitation of customers by nonresident salesmen who entered West Virginia infrequently; (ii) delivery of the product to West Virginia customers in vehicles owned by Ashland; (iii) delivery of the product through a pipeline ending in West Virginia.

Despite the substantially interstate nature of the Ashland sales involved in this appeal, the Circuit Court held that Ashland was a "unitary business" operating in West Virginia and, consequently, that a sufficient corporate nexus with West Virginia existed to permit taxation of the sales at issue, without regard to the lack of any nexus between those transactions and the taxing jurisdiction of West Virginia. App. 7a-8a. The Circuit Court rejected Ashland's assertion that interstate sales unrelated to its business in West Virginia cannot be subjected to a state gross receipts tax in the absence of some substantial local activity related to such transactions.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Ashland appeals as a taxpayer against which the West Virginia State Tax Commissioner is attempting to enforce a State tax statute found unconstitutional by this Court more than four years ago. For more than a decade Ashland has been resisting, in State administrative proceedings and in the courts of West Virginia, the imposition of this West Virginia wholesale gross receipts tax on constitutional grounds. The Court of Appeals, however, concluded that this Court's ruling in the *Armco* case does not require that the West Virginia State Tax Commissioner cease his efforts to collect this tax, despite the concession by the Court of Appeals that "the assessment against Ashland came within the holding of the United States Supreme Court in *Armco*." App. 17a. In addition, the Circuit Court, following the unitary business test adopted by the Court of Appeals in the *Armco* case, has ruled that the West Virginia State Tax Commissioner may exact this gross receipts tax from Ashland with respect to its interstate sales despite the fact that the transactions sought to be taxed were unrelated to Ashland's business activities in West Virginia. These conclusions of the Court of Appeals and the Circuit Court present questions that are substantial for the reasons set forth below.

I.

The Decision of the Court of Appeals Endorses a Continuing Violation of the Constitution in Contravention of this Court's Decision in *Armco Inc. v. Hardesty*

The failure of the Court of Appeals to follow this Court's *Armco* interpretation of the Commerce Clause in a subsequent and virtually identical case, signals that something is seriously wrong here. Article VI of the Constitution provides that that document is the "supreme Law of the Land" and goes on to point out that "the Judges in every State shall be bound thereby." And this Court has made clear that the "interpretation of the [Constitution] enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes

it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' " *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Thus, the question arises as to why this Court's earlier *Armco* decision, conceded to be in point, was not followed by the Court of Appeals in this proceeding.

The answer to that question lies in the misguided view of the Court of Appeals that the issue presented is simply whether the *Armco* decision should be applied retroactively. Ashland submits that the question of the retroactive application of *Armco* has no bearing upon this case. Properly posed, the question presented is whether the State Tax Commissioner is free to continue to enforce collection of a tax after the taxing statute has been struck down as unconstitutional by this Court. That question must be answered in the negative.

In the Court of Appeals, Ashland asserted that this Court's decision in *Armco* precluded the imposition of the West Virginia wholesale business and occupation tax on taxpayers which, like Ashland, were challenging West Virginia's constitutional entitlement to collect such tax at the time of the *Armco* decision. On brief Ashland stated:

> [E]ven in those rare instances where a particular decision is said to be prospective, the decision nevertheless applies to all *pending cases* whether at the trial level or on appeal. Thus, in any situation where a particular matter has not been finally adjudicated at the time the decision of the court is issued, such decision will be applied to controversies involving the same issue.

Brief of Appellee at 13, *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986).

The Court of Appeals rejected this contention. App. 22a n.10. Instead, and here is where things went awry, the Court of Appeals perceived the dispositive question to be whether, under civil retroactivity standards established by state law which are in certain respects similar to those established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the *Armco* holding should be

applied retroactively.[1] As a matter of state law, it determined that retroactive application of *Armco* was not warranted. And based on that determination, the Court of Appeals went on to reach the startling conclusion that the State Tax Commissioner may continue to assess and collect the very tax which this Court previously had decided could not constitutionally be imposed. App. 21a n.8. In reaching that conclusion, the Court of Appeals disregarded a controlling line of authority in this Court, expanded the concept of civil nonretroactivity beyond reasonable bounds, and thereby sanctioned a continuing constitutional violation.

Since the turn of the last century it has been recognized that a rule of federal law announced by this Court when another civil case is pending on direct review in a lower court must be applied in the pending case. This doctrine originated in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), in which Chief Justice Marshall stated that, where on appeal subsequent to a judgment, "a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied." *Id.* at 110. And this Court has acknowledged that the doctrine of *Schooner Peggy* applies whether the announcement of a rule of law is "constitutional, statutory or judicial." *See Thorpe v. Housing Auth.*, 393 U.S. 268, 282 (1969). *See also United States v. Chambers*, 291 U.S. 217 (1934) (constitutional change); *Bradley v. School Bd.*, 416 U.S. 696 (1974) (statutory change); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) (judicial change). This long-standing doctrine should control this case.

In concluding otherwise, the Court of Appeals turned to State civil nonretroactivity standards similar in certain respects to those adopted in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a case which has been held to modify the rule of *Schooner Peggy* in certain limited circumstances where an issue of retroactivity is presented. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621-22 (1987); *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025-26 (1987). The Court of

1 The standards of *Chevron Oil* are discussed at Part II, *infra*.

Appeals mistakenly perceived a retroactivity issue here because it assumed that Ashland seeks retroactive application of the *Armco* decision to protect it against collection of the tax at issue. That assumption was unwarranted because, as explained below, Ashland's success in this case requires only prospective application of *Armco*.

Retroactivity connotes a request by a litigant that a decision relate back and impact an earlier final judgment or affect in a prejudicial manner conduct engaged in, in reliance upon a prior inconsistent rule, before the new rule was announced. Thus, *Chevron* held that a prior decision of this Court, holding that a shorter statute of limitations period governed the action involved in *Chevron* than that justifiably relied upon by the litigant in previously commencing his action, should not be applied to bar the action. *Accord Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621-22; *Saint Francis College v. Al-Khazraji*, 107 S. Ct. at 2025-26. And in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), relied upon by the Court of Appeals, this Court held that its ruling, which concluded that a state law limiting participation in revenue bond elections to propertied taxpayers violated the Constitution, would not be applied to invalidate elections that had previously occurred, but would prevent such elections from taking place in the future.[2] *Accord City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). In fact, every civil case in which the doctrine of nonretroactivity has been invoked by this Court has involved the application of a newly announced rule which impacted an earlier final judgment

2 The Court of Appeals also relied on *Lemon v. Kurtzman*, 411 U.S. 192 (1973). However, that case did not involve a question of retroactive application of a decision of this Court, but rather involved a question "relating to the appropriate scope of federal equitable remedies," 411 U.S. at 199, where the application of a constitutional decision of this Court would operate to deprive a private litigant, who had no responsiblility for an unconstitutional statute, of rights that had matured and become vested prior to the decision. *Lemon* is simply inapposite here since the applicaton of *Armco* will not deprive a litigant (private or otherwise) of rights that had become vested. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Bradley v. School Bd.*, 416 U.S. 696 (1974).

or affected previous conduct in a prejudicial manner. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). This is not such a case.

The fundamental state action which Ashland has been resisting throughout these proceedings is the assessment and collection of West Virginia gross receipts tax on certain wholesale sales on the ground that the imposition of such tax would violate the Constitution.[3] Under applicable State law, Ashland had the right to contest its liability for the tax at issue before the State could collect the tax, and Ashland availed itself of that right. *See* W. Va. Code § 11-10-8(a), (b) (1986). App. 53a-54a. Under these pre-collection procedures, Ashland's liability to pay the tax could not become fixed unless and until its administrative and judicial remedies were exhausted and a final judicial determination was made that the tax could constitutionally be imposed. *See* W. Va. Code §§ 11-10-8(a), (b) (1986), 11-10-9 (1978), 11-10-10(a) (1978). App. 54a-55a. Moreover, the State's authority to collect the tax was subject to the same conditions precedent. *See* W. Va. Code §§ 11-10-8(b) (1986), 11-10-9 (1978), 11-10-10(a) (1978). App. 53a-55a. Thus, at the time of the *Armco* decision, Ashland had no pre-existing liability to pay the tax and collection of the tax could not have been enforced. It follows that application of the *Armco* decision to Ashland's case would simply have the effect of precluding the State Tax Commissioner from assessing and collecting the unconstitutional tax. It would not operate to eliminate any pre-existing tax

3 It is important to distinguish this case from those in which a taxpayer seeks a refund of taxes paid under a statute which, after payment, is declared to violate the Constitution. *See, e.g., Tyler Pipe Indus. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In those cases the constitutional violation (*i.e.*, the collection of the tax) occurred prior to a declaration of the statute's unconstitutionality. Such cases present issues similar to those addressed in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), which involved "a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Id.* at 199. In this case Ashland does not request a remedy for a prior constitutional violation, but merely seeks to prevent such a violation from occurring at all. The Court of Appeals failed to recognize this distinction. *See* App. 17a n.5, 21a n.8.

liability of Ashland, and would not impact a prior final judgment or affect in a prejudicial manner prior conduct engaged in by West Virginia before the *Armco* decision. The *Chevron* doctrine of nonretroactivity is, consequently, simply inapplicable here, and the West Virginia courts were compelled to follow this Court's *Armco* decision under the rule of *Schooner Peggy*.

Surprisingly, no decision of this Court holds directly that to enjoin the collection by a state of a tax imposed under a statute previously found by this Court to be unconstitutional involves only the prospective application of the prior decision. That conclusion, however, is compelled by cases in which this Court has considered limitations arising under the Eleventh Amendment. In those cases, the doctrine of sovereign immunity would prevent the grant by a Federal court of retroactive relief against a state official, so that the scope of permissible relief turns on "the difference between prospective relief on one hand and retrospective relief on the other." *See Quern v. Jordan*, 440 U.S. 332, 337 (1979). Nevertheless, consistent with these Eleventh Amendment limitations, this Court has granted injunctions precluding states from collecting taxes where the imposition of such taxes was alleged to be in violation of the Constitution. *See, e.g., American Trucking Assoc. v. Gray*, 108 S. Ct. 2 (1987); *Georgia R. R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952). Important here is that these holdings were considered to be "prospective" rather than "retroactive," even though the taxes at issue were attributable to periods before any invalidation of the statute. In granting such an injunction this Court noted that the taxpayer "merely seeks the cessation of [the state tax collector's] allegedly unconstitutional conduct and does not request affirmative action by the State." *Georgia R. R. & Banking Co. v. Redwine*, 342 U.S. at 304-05 n.15. Also important is that these cases demonstrate that it is the collection of an unconstitutional tax that is not permissible; otherwise there would be no occasion for granting an injunction prior to a determination of constitutionality.

Finally, this Court has made clear that continuing constitutional violations will not be sanctioned under the guise of "retroactive" relief where the violative conduct arises after the date of announcement of a new rule. In *Bazemore v. Friday*, 478

U.S. 385 (1986), this Court rejected the contention that discriminatory differences in salaries should be maintained after a change in the law making such discrimination illegal, stating that "[a] pattern or practice that would have constituted a violation of [the new law], but for the fact that the [new law] had not yet become effective, became a violation upon [the new law's] effective date." *Id.* at 389. The parallel conclusion that collection of the tax involved here became a constitutional violation at the time of the *Armco* decision is unavoidable.

Ashland submits that the Court of Appeals, under the guise of its nonretroactivity analysis, has sanctioned a continuing violation of the Commerce Clause in this case in direct contravention of this Court's decision in the *Armco* case, and has thereby failed to fulfill its constitutional obligation to respect the constitutional decisions of this Court.

II.

The Retroactivity Standards Established in *Chevron* Have Been Met

The foregoing discussion illustrates that critical to a resolution of the issue presented here is an identification of exactly what state action was precluded by the 1984 decision of this Court in *Armco*. As noted above, Ashland maintains that the *Armco* decision precludes subsequent collection of the unconstitutional tax under the circumstances presented here, so that no issue of retroactivity is presented. The Court of Appeals, on the other hand, held that the tax at issue here can be collected from Ashland unless the *Armco* decision is applied retroactively to transactions occurring prior to *Armco*. It was this line of reasoning that led the Court of Appeals to rest its decision on an analysis of West Virginia retroactivity standards which are in certain respects similar to those established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[4] Ashland believes that even if

4 If retroactivity is thought to be the issue in this case, because the question involves the application of a constitutional decision of this Court the applicable test is that established in *Chevron*. *See Griffith v. Kentucky*, 107 S.Ct. 708, 713 n.8 (1987). This discussion, therefore, analyzes this issue by reference to the *Chevron* standards.

Chevron were controlling, the tests set forth there would preclude collection of the unconstitutional tax after the *Armco* decision.

Chevron established three factors relevant in determining whether a decision should be retroactively applied: First, as a threshold test, whether the decision in question established a new principle of law; second, whether nonretroactivity would retard or further operation of the rule in question; and finally, the relative equities of retroactive and nonretroactive application must be weighed. 404 U.S. at 106-107. Ashland submits that the *Armco* decision established no new principle of law, and that consideration of the second and third factors fails to justify nonretroactivity.

A. The *Armco* Decision Did Not Establish a New Principle of Law

The single controlling principle of constitutional law applied in *Armco* was that a state may not discriminate against interstate commerce by subjecting it to a heavier tax burden than that borne by similar intrastate enterprises. On the face of it, this is a far cry from the establishment of a new principle of law.

According to *Chevron*, a decision will be found to have established a new principle of law if (i) it overruled clear past precedent on which the party urging prospective operation relied, or (ii) it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 106. Neither of these tests is met here.

Clear Past Precedent. As early as 1948 the Supreme Court of Washington had this to say about a Washington gross receipts tax on wholesale sales identical in every important respect to the West Virginia tax involved here:

> [T]he statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in [the statute], not levied upon those who perform the same taxable act, but

> who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal constitution, and is invalid.

Columbia Steel Co. v. State, 30 Wash.2d 658, 664, 192 P.2d 976, 979 (1948).

And in 1964, referring to the same Washington gross receipts tax, three Justices of this Court observed:

> This provision, on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers.

General Motors Corp. v. Washington, 377 U.S. 436, 459 (1964) (Justice Goldberg, joined by Justices Stewart and White, dissenting).

Against this background of fair warning, the Court of Appeals focused principally on the 1982 dismissal of the appeal in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). *Columbia Gas* arose under the West Virginia gross receipts tax on wholesale sales and involved a discrimination issue very similar to that involved in the *Armco* case. The *Armco* decision therefore noted in effect that *Columbia Gas* was overruled on this discrimination issue. 467 U.S. at 643 n.7. From this the Court of Appeals reasoned that the *Chevron* test is satisfied because *Armco* overruled clear past precedent on which the State had relied. App. 19a. This conclusion suffers from two defects.

First, while the dismissal of *Columbia Gas* indeed technically overruled a precedent, this Court's "decision not to review fully the questions presented . . . is not entitled to the same deference given a ruling after briefing, argument, and a written opinion." *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979). Consequently, that dismissal could not justify as much reliance as a full opinion, particularly in light of the prior judicial observations regarding the same tax scheme in the State of Washington. Certainly this summary dismissal should not be considered the clear past precedent required under the threshold test of *Chevron*. Second, and more importantly, the suggestion that

West Virginia relied upon the dismissal of *Columbia Gas* in 1982 rings hollow. The statute struck down in *Armco* had been in effect in West Virginia for more than 50 years. The idea that the State was lulled into reliance on a summary dismissal in *Columbia Gas* after 49 years of operation of the tax, nearly 35 of those years subsequent to *Columbia Steel*, is simply not credible. The truth of the matter is that the dismissal in *Columbia Gas* had no effect at all on West Virginia's long-standing commitment to the statute found unconstitutional in *Armco*.

Issue of First Impression. Nor can it be concluded that *Armco* decided an issue of first impression the resolution of which was not clearly foreshadowed. The Court of Appeals characterizes the *Armco* decision as "[d]eparting from the clear course of recent decisions on this issue." App. 15a. Two examples are cited: First, this Court's conclusion in *Armco* that the tax on wholesale sales in West Virginia was not a compensating tax for that State's tax on manufacturing; and second, the application by this Court of a standard of internal consistency in testing the West Virginia tax at issue under the Commerce Clause. App. 15a. The fact of the matter is that both of these allegedly new rules simply involved the application of well-settled legal principles to the facts presented.

Whether one tax compensates for another was not an "issue of first impression" within the meaning of *Chevron*. Quite to the contrary, decisions of this Court spanning many decades have dealt with precisely this issue. *See Maryland v. Louisiana*, 451 U.S. 725 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932). The *Armco* decision simply applied the standards developed in those cases to an analysis of the relationship between the wholesale and manufacturing taxes in West Virginia. This application of traditional legal standards does not involve the resolution of an issue of first impression.

The second issue asserted to have been one of first impression by the Court of Appeals arose from the application by this Court, in testing for discrimination against interstate com-

merce, of the requirement "that a tax must have 'what might be called internal consistency—that is, the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." 467 U.S. at 644 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)). While the *Armco* decision may be the first to have applied the label "internal consistency" in the gross receipts tax area, the rule so labeled has been used for many years as a gross receipts tax test of discrimination under the Commerce Clause.

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), this Court considered the constitutionality of a Washington tax on the gross receipts from interstate commerce. In holding the tax to be in violation of the Commerce Clause, this Court observed:

> If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove.

Id. at 439-40 (citations omitted).

Although not termed "internal consistency," this analysis from *Gwin, White & Prince* is precisely the internal consistency standard applied in the *Armco* decision. Thus, testing discrimination under the concept of internal consistency by asking what would result from the adoption by another state of a similar gross receipts tax scheme is not in any respect a new rule.

B. Even If the *Armco* Decision Were Found To Have Established a New Principle Of Law, Retroactive Application Would Be Required

If this Court were to find that the *Armco* decision established a new principle of law, thus satisfying the threshold test for nonretroactive application under *Chevron*, there remain two additional considerations to be weighed in determining whether the application of the *Armco* decision should be prospective only: First, in view of the purpose of the prohibition against discrimination, whether nonretroactive application would retard or further that purpose; and second, whether equity favors retroactive or nonretroactive application. The Court of Appeals did not address the first consideration and misapplied the second. Properly applied, those tests call for an application of *Armco* that would preclude collection of the tax at issue in this case.

Purpose of the Commerce Clause. In terms of the purpose of the Commerce Clause, if the *Armco* decision were held to permit a state to collect the very same tax that was held in *Armco* to discriminate against interstate commerce, the practical effect would be to permit a continuing violation of the Commerce Clause. In this very real sense, application of a finding of unconstitutionality in a manner allowing continued enforcement of a tax after it has been declared unconstitutional would retard the purpose of the Commerce Clause by offering the inducement of a clear financial advantage to those states which violate it.

A further reason why nonretroactive application of *Armco* would retard the purpose of the Commerce Clause lies in the reasonable expectations of those engaged in interstate commerce that the Commerce Clause stands as a barrier against the collection of unconstitutional taxes. Commercial confidence in the enforcement of fundamental constitutional protections would be shaken by a ruling in this case that the State may continue to collect the unconstitutional tax because the finding of unconstitutionality is to be prospective only. To the extent that the successful functioning of our intricate commercial system rests ultimately on confidence in our Constitution and laws, a

nonretroactive application of the *Armco* decision would tend to erode that confidence and so would retard the purpose of the Commerce Clause.

Relative Equities. The second balancing test under *Chevron* requires a comparison between the equities of permitting the State affirmatively to invoke its process to collect constitutionally defective taxes and the equities of permitting taxpayers to resist the imposition of such discriminatory taxes.[5] Such a comparison in this case favors retroactive application of the *Armco* decision.

This Court stated in *Chevron* that the legitimate inquiry in balancing the equities is whether past events can be unwound without "injustice or hardship." 404 U.S. at 107 (*citing Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). Clearly, no injustice or hardship to West Virginia will result by precluding the State Tax Commissioner from collecting the taxes at issue. The Tax Commissioner cannot claim to have a vested right to these taxes, and no allegation has been made that the State has previously committed these funds for a particular use. Requiring Ashland to pay a facially discriminatory tax, on the other hand, operates as a clear injustice.

In addition, if blame is to be assessed as between the State of West Virginia and its taxpayers, it is the State which must accept full responsibility for the constitutional invalidity of its gross receipts tax. The State for many years imposed a tax which was discriminatory on its face, in spite of the clear warnings in *Columbia Steel* and *General Motors* that the West Virginia scheme was constitutionally defective. By ignoring those warnings, the State assumed the risk that eventually its taxing statute would be struck down. Moreover, ignoring those warnings was a gamble which paid off handsomely for the State. Over the 50 years that West Virginia imposed its discriminatory

5 The Court of Appeals, in weighing the equities, misstated the effect of a holding in Ashland's favor in this case. The Court of Appeals stated that "retroactive application of the *Armco* rule would cause severe hardship, estimated at $50 million in tax refunds." App. 20a. It should be emphasized that this case has no bearing upon whether *Armco* should be applied to require West Virginia to refund taxes already collected. *See* n. 3, *supra*. That question is simply not presented here.

tax (the bulk of those years subsequent to the *Columbia Steel* decision in 1948) the State has collected many millions of dollars in unlawful taxes.

The effect of the Court of Appeals' decision below is to expand that windfall by allowing the State not only to retain all taxes already collected, but also affirmatively to continue to collect all taxes on sales taking place before the date of the *Armco* decision. That result is hardly equitable. The State will realize no "loss" if this extraordinary grace is not granted to it. The amounts at issue here are funds to which the State is not entitled, and every consideration of equity weighs against permitting the State to shift to innocent taxpayers the loss from the risk of invalidity which the State undertook.

III.

The Decision of the Circuit Court Directly Conflicts with this Court's decision in *Norton Co. v. Dep't of Revenue* in Holding That the Unitary Business Principle Can Validate a Gross Receipts Tax Under the Commerce and Due Process Clauses

Wholly apart from the constitutional defect addressed by this Court in the *Armco* case, imposition of the gross receipts tax in this case would violate the Due Process and Commerce Clauses because no substantial nexus existed between the sale transactions at issue and the taxing jurisdiction of West Virginia. The Circuit Court was unimpressed with stipulated facts which established that (i) the particular sales at issue were unrelated to Ashland's business operations in West Virginia, and (ii) the sales themselves had no substantial connection with West Virginia. It held that because Ashland was a "unitary business" with extensive operations in West Virginia there existed a sufficient nexus between West Virginia and Ashland to allow West Virginia to tax all the transactions at issue, even though those transactions were unrelated to Ashland's West Virginia business activities and even though a substantial number of those sales had no independent connection at all with West Virginia. The Circuit Court thus undertook to create the constitutionally required nexus by shifting the inquiry from an examination of

the connection between the State and the sale transactions sought to be taxed to a consideration of the relationship between the State and activities of the taxpayer which were unrelated to those transactions. App. 4a, 7a-8a. Not only is this a radical departure from the traditional constitutional limitations on state gross receipt taxes developed by this Court. It is also at odds with standards of basic fairness because Ashland paid its full share of West Virginia taxes on its business activities conducted within the State. Those activities should not be used again to support the taxation of Ashland's interstate sales to West Virginia customers.

Application of the unitary business test to gross receipt taxes is a concept crafted by the Court of Appeals and first announced in its opinion in the *Armco* case. This novel theory is directly contrary to the long-standing nexus standard in gross receipts tax cases established by this Court in *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951). In *Norton*, which also involved a state gross receipts tax on certain sales, this Court held that to find the required nexus one must look to the connection between the taxing state and the sales transaction it seeks to tax, and that a sales transaction without any connection with the state may not constitutionally be subjected to a gross receipts tax merely because the taxpayer is engaged in unrelated business activities within the State.

Norton concerned a Massachusetts manufacturer maintaining a branch office and warehouse in Illinois from which it made local sales. In addition, Illinois buyers placed orders directly with the main office of Norton in Worcester, Massachusetts, receiving shipments directly from there. This Court affirmed the imposition of tax on the sales proceeds from orders received or filled by the Illinois branch office, but said that the tax could not be applied to sales unrelated to the local facility:

> The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from

> Worcester. Income from those we think was not subject to this tax.

Id. at 539.

The requirement that in gross receipt tax cases a nexus must exist with respect to each individual sale transaction being taxed was made clear in *Norton*:

> But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature.

Id. at 537.

The sales made by Ashland in this case could not be further "dissociated" from Ashland's other activities in West Virginia. In fact, the parties have stipulated that these sales were unrelated to Ashland's West Virginia activities. The Circuit Court, by relying upon the Court of Appeals' unitary business analysis in *Armco*, simply failed to acknowledge the continuing vitality of *Norton*. Evidence of *Norton's* continuing vitality, however, abounds. *See Tyler Pipe Indus. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987); *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977) (noting that a finding that a transaction is dissociated from a local business precludes imposition of a gross receipts tax); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (noting that a gross receipts tax may be valid if "applied to an activity with a substantial nexus with the taxing State"); *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965) (referring to nexus as "the outstanding prerequisite on state power to tax"); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). *See also* McHugh & Reed, *The Due Process Clause and the Commerce Clause: Two*

New and Easy Tests for Nexus in Tax Cases, 90 W. Va. L. Rev. 31 (1987).[6]

The Court of Appeals' opinion in the *Armco* case, upon which the decision of the Circuit Court in this case rests, commenced by quoting this Court's summary in *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219-20 (1980), of the requirements of due process, but failed to note that *Exxon Corp.* was concerned only with taxes on net income. Although the Court of Appeals mentioned several pages later that *Exxon Corp.* involved "a different type of state tax," it nevertheless subsequently found "an obvious parallel between Exxon's divisional operation claim and Armco's claim presented here," and concluded that it "can see no distinction between this situation and the unitary business concept." 303 S.E.2d at 712, 714. Not to put too fine a point on it, there is a clear distinction between a tax on net income and a gross receipts tax, and that distinction is critical here.

The classic statement of the distinction between a tax on net income and a gross receipts tax is found in *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321 (1918):

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

Id. at 328-29.

The fact is that all of the cases in which this Court has approved application of the unitary business principle are net income tax cases: *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *F.W. Woolworth Co. v. Taxation and Revenue Dep't*, 458 U.S. 354 (1982); *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980). In each of these cases the unique difficulties of otherwise determining the states' respective shares of the net income of a multistate business are recognized as the sole reason for application of the unitary business principle. No such difficulties are presented by gross receipts taxes, and, the courts of West Virginia to one side, no court has thought it appropriate or necessary to ignore *Norton* by applying the unitary tax rules to create the required nexus in a gross receipts tax context.

CONCLUSION

The Court of Appeals turned to civil nonretroactivity to limit the impact of a prior constitutional decision of this Court, even though the relief requested by Ashland requires only prospective application of that decision. In reaching this conclusion, the Court of Appeals ignored the controlling precedent established by the *Schooner Peggy* line of decisions, and misunderstood the circumstances under which *Chevron* modifies the general rule of *Schooner Peggy*. The result is an endorsement of

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6 Interestingly, the authors of this article are the Chief Justice of the Court of Appeals and his then law clerk. Lamenting the Court of Appeals' application of the unitary business test in gross receipts tax cases, the authors correctly conclude:

> In short, to apply a unitary business *nexus* test in a gross receipts tax case is to remove *the primary* due process clause/commerce clause limitation on the imposition of the business and occupation tax in an interstate commerce context, specifically, a requirement that there be a substantial local business presence which contributed to the activity taxed.

90 W. La. Rev. 49 (emphasis in original; footnote omitted).

While Justice McHugh was a member of the Court of Appeals at the time of its *Armco* decision, he did not participate in the case. *See* 90 W. Va. L. Rev. at 39 n.36.

a continuing violation of the Commerce Clause by permitting collection of a tax previously declared unconstitutional.

Even if one assumes that this case involves a question of retroactivity, the Court of Appeals misapplied the standards for retroactive application of decisions of this Court established in *Chevron*. The basic premise underlying this Court's *Armco* decision was that a state may not discriminate by placing a higher tax burden on interstate commerce than that imposed on interstate business, hardly the adoption of a new principle of law. And beyond that, the Commerce Clause would be disserved by permitting the State Tax Commissioner to continue the collection of the unconstitutional tax, especially where the State had ample warning of the constitutional infirmity in the taxing statute and yet chose to continue to impose the tax on innocent taxpayers. Under these circumstances the *Chevron* standards dictate that the *Armco* case prevents further collections of the tax which was there found to be unconstitutional.

Finally, there can be no principled reconciliation of the *Norton* doctrine, which precludes a state gross receipts tax on interstate sales dissociated from the taxpayer's business activities within the state, and the decision of the Circuit Court in this case, which upholds precisely such a tax. Thus, the choice presented here is stark: abandon the *Norton* dissociation rule or reverse the nexus decision of the Circuit Court. Nothing recommends abandonment of *Norton*. For more than three decades its teaching has stood alongside other limitations imposed by this Court under the Due Process and Commerce Clauses on the jurisdiction of states to extend the generation of revenues beyond their borders. Erosion of these important restrictions on state taxing power would ill serve the states and taxpayers alike, and to this end the *Norton* rule should be maintained.

For the reasons set forth above, this Court should grant plenary consideration to the questions presented on this appeal and enjoin collection of the gross receipts tax at issue from Ashland.

Dated: September 9, 1988

Respectfully submitted,

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Appendix A

OPINION AND FINAL ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

At a Circuit Court For Kanawha County held at the Court House thereof on the 12th day of January, 1988

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. 81-C-2010

ASHLAND OIL, INC., a corporation,

Plaintiff,

v.

HERSCHEL H. ROSE, III, West Virginia State Tax Commissioner and the West Virginia State Tax Department

Defendants.

OPINION AND FINAL ORDER

This action involves an appeal from a decision of the state tax commissioner. Ashland Oil, Inc. (hereinafter "Ashland") appealed the commissioner's decision to this Court on May 20, 1981. While the case was pending in this Court, the United States Supreme Court issued its decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). Relying upon *Armco*, this Court ruled in favor of Ashland.

The tax commissioner appealed this Court's decision to the West Virginia Supreme Court of Appeals. On November 12, 1986, the Supreme Court ruled that the *Armco* decision would not be applied retroactively and that Ashland could not benefit from the *Armco* decision as to taxable periods prior to June 12,

1984. The case was remanded to this Court. *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986).

Ashland then appealed the decision of the West Virginia Supreme Court to the United States Supreme Court. The United States Supreme Court dismissed Ashland's appeal for want of a final judgment. *Ashland Oil, Inc. v. Rose*, ____ U.S. ____, ____ S.Ct. ____, 95 L.Ed.2d 522 (April 27, 1987).

This action is now before the Court for a decision on the issue of whether the State of West Virginia has nexus to tax Ashland's activities within the State.

FACTS

The facts in this action were stipulated by the parties in the administrative hearing before the state tax commissioner. There were nine separate stipulations entered into between the parties. The Court adopts the stipulations as its findings of fact.

The stipulations are contained in the administrative record. There is no need for the Court to restate the stipulations in the body of this opinion.

OPINION

The decision of the United States Supreme Court in *Armco*, *supra.*, held that the business and occupation tax on wholesale sales made in West Virginia by out-of-state manufacturers is unconstitutional. The subsequent decision of the West Virginia Supreme Court in *Ashland Oil*, *supra.*, held that *Armco* would not apply retroactively to taxable periods prior to June 12, 1984, the date of the *Armco* decision. Since the taxable periods in question in this action are prior to June 12, 1984 the taxpayer is not entitled to the benefits of *Armco* for the periods in question in this action.

In *Armco, Inc. v. Hardesty*, 303 S.E.2d 706 (W. Va. 1983), the West Virginia Supreme Court held:

Syllabus by the Court

1. For the purposes of the Due Process and the Commerce Clauses of the United States Constitution, where a business has been found to have a substantial nexus with this State, and where there is a rational relationship between the tax imposed on its business activity within this State, and the protection, opportunities, and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned.

2. Where a unitary business has a substantial nexus in this State through its qualifying to do business in this State, and engaging in operations such as coal mining and sales of metal products, we are not required to separate the activities of its various divisions doing business in this State and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant imposition of a business and occupation tax.

3. Whether there is a rational relationship or fair apportionment of a tax to the local services and benefits afforded a taxpayer must also be answered by viewing the taxpayer's total activities in this State. West Virginia's business and occupation tax is composed of a number of individual taxes tied to specific business activities occurring within this State. Thus, the business and occupation tax bears a relationship to apportionment to business activity in this State because the tax is imposed based on the value of the business activity occurring within the State.

In this decision, the Court must determine if the nexus standard stated by the West Virginia Supreme Court in *Armco* is still valid and, if not, determine the proper standard to apply. Second, the Court must determine whether Ashland has nexus with West Virginia, under the appropriate standard, sufficient to allow the State to impose the business and occupation tax. Third, the Court must determine whether there is a rational

relationship between the tax paid and the local services and benefits afforded to the taxpayer.

I.

Syllabus point 1 of the West Virginia Supreme Court's decision in *Armco, Inc. v. Hardesty*, *supra.*, is a summary of the holding in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1976). The holding of *Complete Auto* has not been repudiated by the United States Supreme Court.

As its basis for syllabus point 2 of the *Armco* decision, the West Virginia Supreme Court relied heavily on the decision in *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964). *General Motors* provided guidance as to what constitutes substantial nexus between a state and a taxpayer for purposes of imposing a tax on interstate commerce. In *General Motors*, the Court stated that where the corporation paid tax on various operations but contended that other operations were not subject to taxation, the applicable test involved the bundle of corporate activities. The corporation mingled its taxable business with business claimed to be nontaxable. It failed to show that services rendered in admittedly taxable business did not aid in establishing and holding that portion of the business which is claimed to be nontaxable, that the operations claimed to be exempt from taxation are disassociated from the local business and interstate in nature.

Since *Armco*, the United States Supreme Court has overruled, in part, its decision in *General Motors* and, in its stead, adopted, in part, Justice Goldberg's dissenting opinion. *National Can Corp. v. Washington Dept. of Revenue*, 483 U.S. ____, ____, 107 S.Ct. ____, ____, 97 L.Ed.2d 199, 214 (1987). The Supreme Court explicitly adopted that portion of Justice Goldberg's opinion which dealt with how the Washington business and occupation tax multiple activities exemption discriminates against interstate commerce. The court did not express any dissatisfaction with that portion of the majority opinion which discussed nexus between a taxpayer and a State.

This Court is of the opinion that that portion of *General Motors* dealing with nexus is still valid law as to the nexus portion of the *Complete Auto* test. The West Virginia Supreme Court's decision in *Armco* is also valid law insofar as it discusses what constitutes substantial nexus between a taxpayer and a State. In reversing *Armco* and partially overruling *General Motors* on the discrimination issue, the United States Supreme Court expressed no disapproval of the nexus portion of either decision. The nexus portion of the *Armco* decision is valid law which will be applied to the taxpayer in this case.

II.

In *Armco*, the West Virginia Supreme Court discussed the standards that it and the United States Supreme Court applied in prior cases. From *General Motors*, *supra*, the Court considered the bundle of corporate activities and whether taxable activities were mingled with activities claimed to be nontaxable. From *Standard Pressed Steel*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975), the Court considered whether activities within the taxing state made possible the realization and continuation of valuable contractual relations within the taxing state. From *J.C. Penny Co., Inc. v. Hardesty*, 164 W.Va. 525, 264 S.E.2d 604 (1979), the Court considered whether the activities of the taxpayer were facilitated by its overall operations. From *Western Maryland Ry. v. Goodwin*, 167 W. Va. 804, 282 S.E.2d 240 (1981), the Court concluded that purposive, revenue generating activities are sufficient to render a person liable for taxes. In tying these standards together, the Court determined that where a taxpayer has a substantial nexus with the State through qualifying to do business in the State and engaging in substantial operations, such as mining and selling metal products, the State is not required to separately consider the activities of each of its divisions doing business in the State for the purpose of determining whether each division in isolation, has a sufficient connection with the State to warrant imposition of the business and occupation tax. *Armco*, *supra*, at 714.

Armco, Inc. was an Ohio corporation qualified to hold property and do business in the State of West Virginia. It had four divisions which maintained some contact with the State of West Virginia. The Mining Division engaged in extensive mining, cleaning and selling of coal in West Virginia. Armco acknowledged that its Mining Division had sufficient nexus with the State of West Virginia.

The Metal Products Division produced and sold construction products. It maintained an office in West Virginia. Two sales engineers and a secretary worked out of the office. Office personnel managed all West Virginia sales of division products, except for the sale of metal buildings, which were sold by franchisees who were West Virginia residents authorized to use Armco's name and trademarks. Armco shared advertising expenses with its franchisees. Armco conceded nexus as to Metal Products Division sales, except for sales of metal buildings.

The Steel Group produced steel products. No manufacturing facilities were located in West Virginia. No sales offices or personnel were located in West Virginia. The Cincinnati and Pittsburgh offices each sent two nonresident salesmen into West Virginia every four to six weeks. One salesman went from Pittsburgh to Wheeling twice each month.

The salesmen were not authorized to accept or reject orders. Sales were accepted or rejected at out-of-state offices. Goods were shipped from out-of-state locations by common carrier and title passed to the common carrier at the out-of-state location. Salesmen made follow-up calls to determine if customers were satisfied. Occasionally Steel Group personnel would investigate customer complaints and perform some service work. Armco denied any nexus as to sales made by the Steel Group.

The Union Wire Rope Group had activities similar to the Steel Division. Neither manufacturing facilities nor warehouses were located in West Virginia. There were no offices or sales or service personnel located in West Virginia. Three salesmen, one each from Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina, made sales calls on West Virginia customers once or twice each month. The salesmen were not authorized to accept or reject orders. Sales were accepted or

rejected at Middletown, Ohio. Goods were shipped to West Virginia customers in the same manner as sales made by the Steel Group. Armco argued that there was no nexus between the State of West Virginia and the Union Wire Rope Group.

From these facts the West Virginia Supreme Court determined that Armco, Inc. was a unitary business corporation conducting its business under one corporate umbrella. Since the corporation admitted nexus with the State through the activities of two of its divisions, there was sufficient nexus to tax all of its West Virginia sales.

Ashland consists of five subsidiary companies, which are comprised of thirty different operating divisions. Ashland owns substantial amounts of property in West Virginia including plants, storage facilities, transportation facilities, gasoline stations, oil and natural gas production facilities, and retail and wholesale outlets for marketing its various products. It also maintains an inventory of products in the State.

Ashland's activities in West Virginia include the production of natural resources, manufacturing products, retail and wholesale sales, rental of property and services or other businesses not otherwise specifically taxed under the business and occupation tax. For fiscal year 1974-75, the taxpayer reported gross income on its business and occupation tax return in excess of $87.5 million; which the Tax Department increased to over $114.3 million. For fiscal year 1975-76, the taxpayer reported gross income on its business and occupation tax return of almost $90.4 million; which the Tax Department increased to over $126.9 million.

To facilitate its business activities in the State of West Virginia, Ashland engages in local advertising, local soliciting and delivery by company-owned vehicles. It provides technical advisors and marketing assistance. The local inventory and offices also help facilitate West Virginia sales.

As Armco was determined to be a unitary business, so, too, is Ashland a unitary business. Both engaged in the production of natural resources. Both sold products in the State, and both taxpayers admitted that at least some of their sales were subject to taxation by the State of West Virginia. There is sufficient

nexus between Ashland and the State of West Virginia to allow the State to tax Ashland's business activities within the State.

III.

The final question which this Court must address is whether there is a rational relationship between the tax paid and the local services and benefits afforded to the taxpayer. Syllabus point 3 of the West Virginia Supreme Court's decision in *Armco* states that the nature of the business and occupation tax requires that the tax bear a relationship to the benefits accorded by the State, because it is imposed solely on business done within the State.

Order

In accordance with the above, the Court does hereby ORDER and ADJUDGE that the decision of the state tax commissioner is affirmed.

The Court does hereby FURTHER ORDER that a certified copy of this Final Order be sent to all parties or counsel of record. The Court notes the objection and exception of the party or parties aggrieved by this Final Order.

Date: 1/12/88

ENTER:

/s/ A. ANDREW MCQUEEN
JUDGE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, Cathy S. Gatson, Clerk of the Circuit Court of said County and in said State, do hereby certify that the above bill is for services actually rendered by this office. [sic] Given under my hand and the seal of said Court this the 13th day of January, 1988.

/s/ CATHY S. GATSON, Clerk
CIRCUIT COURT OF
KANAWHA COUNTY,
WEST VIRGINA

Appendix B

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DECLINING REVIEW OF THE OPINION AND FINAL ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of June, 1988, the following order was made and entered.

ASHLAND OIL, INC.

vs.

HERSCHEL H. ROSE, III, State Tax Commissioner of West Virginia, and the West Virginia State Tax Department

On a former day, to-wit, April 11, 1988, came the petitioner, Ashland Oil, Inc., by Goodwin & Goodwin, Thomas R. Goodwin, Susan C. Wittemeier, and Larry A. Carver, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 12th day of January, 1988, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused. Chief Justice McHugh would grant.

A True Copy

Attest: /s/ ANCIL G. RAMEY
Clerk, Supreme Court of Appeals

Appendix C

ORDER OF THE SUPREME COURT OF THE UNITED STATES DISMISSING APPELLANT'S APPEAL OF THE PRIOR DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT OF THE UNITED STATES

No. 86-1295

ASHLAND OIL, INC.,
Appellant,

v.

HERSCHEL H. ROSE, III, State Tax Commissioner of West Virginia
Appellee.

APPEAL—STATEMENT:

Appeal from the Supreme Court of Appeals of West Virginia

OPINION:

The motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as amicus curiae is granted. The appeal is dismissed for want of a final judgment.

Appendix D

OPINION AND ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, REVERSING AND REMANDING THE CIRCUIT COURT OF KANAWHA COUNTY'S GRANT OF SUMMARY JUDGMENT

No. 16962

ASHLAND OIL, INC.

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER

Kanawha County — Reversed.

Brotherton, *Justice*

1 The decision of the United States Supreme Court in *Armco, Inc. v. Hardesty* invalidated the West Virginia Business and Occupation Tax on wholesale sales by out-of-state manufacturers. 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984).

2 "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a

clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of law in their overruling decisions." Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

Brotherton, *Justice*:

This is a West Virginia Business & Occupation Tax case in which the parties dispute the scope of application of the United States Supreme Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). The State Tax Commissioner appeals from a summary judgment granted by Judge Workman of the Kanawha County Circuit Court, which held that business and occupation tax assessed on Ashland Oil, Inc.'s wholesale sales was invalid under *Armco*. We agree with the circuit court that the *Armco* decision applies to the facts of this case. We nevertheless reverse the summary judgment, because in our opinion the holding in *Armco* should be applied prospectively only.

The appellee, Ashland, is a Kentucky corporation qualified to do business in West Virginia. It is an integrated oil company engaged in a wide variety of business enterprises. Pursuant to an agreement between a previous tax commissioner and Ashland, the State Tax Department conducted a detailed audit of Ashland's fiscal years ending September, 1975 and September, 1976. The audit resulted in a deficiency assessment in the amount of $181,313.22 for business and occupation tax on wholesale sales with West Virginia destinations. Ashland filed a petition for reassessment and objected to the proposed adjustments. The Commissioner upheld the assessment of tax in an administrative decision dated April 21, 1981.[1] Ashland filed a timely appeal to the Circuit Court of Kanawha County.

1 The administrative decision refers to adjustments in the retail sales classification for 1975, as well as in the wholesale classification for both the

At the administrative level, and also in briefs filed in the circuit court, the controversy focused on whether various sales operations of Ashland had sufficient nexus with the State of West Virginia to support the imposition of the business and occupation tax. The Commissioner concluded in his administrative decision that the contacts of the corporation as a whole were sufficient to support the imposition of tax on all sales having West Virginia destinations. Ashland, however, contended throughout the proceedings that sales by separate marketing units should be evaluated separately for nexus with the state. Prior to resolution of this issue in the circuit court, the United States Supreme Court decided *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), and the circuit court granted Ashland summary judgment on that basis.

I

Armco, like Ashland Oil, was a diversified corporation embroiled in a dispute with the State Tax Department over the ability of the State of West Virginia to impose business and occupation tax on certain of its wholesale sales to West Virginia customers. This Court reversed a decision of the Circuit Court of Kanawha County, and reinstated an assessment of tax against Armco, holding: (1) Armco was a unitary business with a substantial nexus to West Virginia, and it was not necessary to consider each division of the corporation separately to determine whether tax could be imposed; (2) there was a rational relationship of the tax to the local services and benefits afforded by the State of West Virginia to Armco, and the tax was fairly apportioned; (3) West Virginia's tax on wholesale sales, from which in-state manufacturers were exempt, did not discriminate against out-of-state manufacturers in violation of the commerce clause, because in-state manufacturers paid a higher tax on gross proceeds from manufacturing; and (4) the

audited years. To the extent that the assessment relates to retail sales, it falls outside the scope of the *Armco* decision, and accordingly is not addressed here.

tax did not violate the "equal and uniform" clause of the West Virginia Constitution. *Armco, Inc. v. Hardesty*, ____ W.Va. ____, 303 S.E.2d 706 (1983).

In an opinion delivered by Justice Powell, the United States Supreme Court reversed that decision, and held that the West Virginia Business and Occupation Tax on wholesale sales unconstitutionally discriminated against interstate commerce, because taxpayers who manufactured their products in West Virginia were exempt from the tax. *Armco, Inc. v. Hardesty*, 467 U.S. at 639.[2]

The Commerce Clause prohibits a state from discriminating between transactions because of some interstate element. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). The Supreme Court in *Armco* found our tax scheme discriminatory on its face, because it taxed certain transactions (wholesale sales) more heavily when they crossed state lines than when they occurred within West Virginia. 467 U.S. at 642. The Court refuted this Court's reasoning that out-of-state manufacturers suffered no actual discrimination, saying that the manufacturing tax could not be deemed a "compensating tax" for the wholesale tax on out-of-state businesses, both because manufacturing and wholesaling are not "substantially equivalent events," and because the statute did not provide for any reduction of the manufacturing tax when goods manufactured in West Virginia were sold out-of-state. 467 U.S. at 643-44. Departing from the clear course of recent decisions on this issue, *see, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 & n.8, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), the Court said that no actual

2 W.Va. Code § 11-13-2c (1983) imposes a tax of 0.27% on gross income of a person engaged in the business of selling at wholesale. At the time *Armco* was decided, and during the audit period in this case, W.Va. Code § 11-13-2 (1974) included an exception from the wholesale tax for manufacturers and producers of natural resources within West Virginia who sold their products at wholesale in West Virginia. The exception for in-state manufacturers was removed effective April 13, 1985. *See* W.Va. Code § 11-13-2 (Supp. 1986).

discriminatory impact was required to establish a Commerce Clause violation. It applied instead the "internal consistency" standard previously used to assess the validity of state net income taxes: "[T]he tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." 467 U.S. at 644, *quoting Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983). Prior to *Armco*, this test had been used only in net income tax cases, where net income must be apportioned among the states in which the taxpayer does business. In gross receipts tax cases apportionment has not been considered necessary, because the source of receipts can be determined directly.[3]

In this case, the Tax Commissioner asserts that the exemption for in-state wholesalers was struck down in the *Armco* decision and not the wholesale tax on out-of-state manufacturers. The taxpayer argues to the contrary, and the text of the *Armco* opinion supports the taxpayer's position. The opening paragraph of the Supreme Court's opinion reads:

> In this appeal an Ohio corporation claims that West Virginia's wholesale gross receipts tax, from which local manufacturers are exempt, unconstitutionally discriminates against interstate commerce. We agree and reverse the state court's judgment upholding the tax.

467 U.S. at 639. As pointed out by counsel for the taxpayer, if the exemption and not the wholesale tax had been struck down, it would not have been necessary to reverse the judgment upholding the wholesale tax.

Armco did, then, strike down the tax on wholesale sales, at least as applied to out-of-state manufacturers.[4] The State Tax

3 We do not rule out the possibility that apportionment may be the only equitable way to resolve the problem of imposing a gross receipts tax on activities that occur partly within and partly outside the taxing state. For an article suggesting this approach, see Judson & Duffy, *An Opportunity Missed*: Armco, Inc. v. Hardesty, *A Retreat from Economic Reality in Analysis of State Taxes*, 87 W.Va.L. Rev. 723 (1985).

4 The State Tax Commissioner Rose recognized as much in a memorandum issued July 20, 1984, one month after the *Armco* decision. The memorandum including the following explanation:

> An out-of-state manufacturer of tangible personal property who sells the same at wholesale (as defined in W.Va. Code § 11-13-1) in this State will be exempt from business and occupation tax under the wholesale classification on the gross proceeds from such sales. The out-of-state manufacturer will continue to be taxable under other classifications of the business and occupation tax just like West Virginia manufacturers.

Commissioner does not dispute that Ashland is an out-of-state manufacturer selling at wholesale within West Virginia. The circuit court was, therefore, correct in concluding that the assessment against Ashland came within the holding of the United States Supreme Court in *Armco*.

II

The Commissioner's second line of defense is that the *Armco* decision should be applied prospectively only, *i.e.*, only from the date of decision, June 12, 1984, forward. The Commissioner filed a petition for rehearing with the United States Supreme Court on this basis, and the petition was denied. Resolution of the retroactivity issue is, therefore, left to this Court.[5]

Although statutes normally operate prospectively only, judicial decisions ordinarily operate retroactively. The courts of this country long have recognized exceptions to the rule of retroactivity, however. *See, e.g., Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall) 175 (1863). In syllabus point 5 of *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), this Court set out five criteria for prospective application of judicial decisions in civil cases:

5 In a similar case, the Supreme Court recently indicated that tax refund issues, or issues concerning the remedy for imposition of an unconstitutional tax, are frequently intertwined with state law and may be better resolved at the state level. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of law in their overruling decisions.

See also Ables v. Mooney, 164 W.Va. 19, 264 S.E.2d 424 (1979).[6]

To apply the *Bradley* factors to this case, in order: First, the substantive issue in *Armco* was state taxation, a traditionally settled area of law, set out in a statute on which taxpayers and their advisors, as well as the State of West Virginia, relied.[7] Neither was the new rule clearly foreshadowed. As noted above,

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6 These criteria follow closely in the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), and later cases.

7 A noted commentator observed: "[Decisions applied prospectively] have a common objective, to rid the law of an unsound rule and at the same time preclude undue hardship to a party that has justifiably relied on it. Reliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents." Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 543 (1977).

the rule used to invalidate the tax in *Armco* was an unexpected retreat from the actual economic impact standard of *Complete Auto* and its progeny. *See, e.g.*, Judson & Duffy, *An Opportunity Missed*: Armco, Inc. v. Hardesty, *A Retreat from Economic Reality in Analysis of State Taxes*, 87 W.Va.L.Rev. 723, 723 (1985); Lathrop, Armco—*A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, 63 Taxes 551, 557-61 (1985). Further, the issue of the constitutionality of the wholesale tax was presented to the Supreme Court in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807, 103 S.Ct. 32, 74 L.Ed.2d 46 (1982), and the Court dismissed the appeal for want of a substantial federal question. This amounts to a ruling on the merits, *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), and Justice Powell acknowledged as much in a footnote to the *Armco* opinion. 467 U.S. at 643-44 n.7. Second, the wholesale tax provision was a substantive, rather than a procedural, rule. Third, it was not a common law decision that was overruled, but a statute that had been enforced since 1935. Its overruling therefore had a widespread impact, the full ramifications of which have yet to be explored in this and other cases. Fourth, the *Armco* decision was a constitutional interpretation that, as discussed above, represented a clear departure from prior precedent. Fifth, previous law required payment of the wholesale tax, and the Supreme Court validated the tax by refusing the Columbia Gas appeal for want of a substantial federal question. *Armco* reversed that precedent by invalidating the tax as applied to out-of-state manufacturers.

All of these factors militate in favor of prospective application of the *Armco* rule. Moreover, our research indicates that other courts often have used prospective application to protect the reliance of state and local officials on money collected or assessed under presumptively valid statutes later declared unconstitutional.

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (*Lemon I*), the Supreme Court struck down Pennsylvania's statutory program for reimbursing non-public sectarian schools for secular education services, because it fostered an excessive entanglement of church schools and the State

of Pennsylvania. In *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) (*Lemon II*), the Court reviewed and affirmed a district court order that permitted Pennsylvania to reimburse the schools pursuant to the statute held unconstitutional for services performed prior to the date of its decision in *Lemon I*.

> The process of reconciling the constitutional interests reflected in a new rule of law with the reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal. . . .": Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set principle of absolute retroactive invalidity but depends upon a consideration of particular relations . . . and particular conduct . . . of rights claimed to have been vested, of status, of prior determinations deemed to have finality; and of public policy in the light of the nature both of the statute and of its previous application."

411 U.S. at 198-99 (citations omitted). The Court acknowledged that implementation of the district court's order might to some extent offend the first amendment values on which its decision in *Lemon I* was based, but concluded that "the remote possibility of constitutional harm from allowing the State to keep its bargain" was offset by the expenses incurred by schools in reliance on promised payments for expenses incurred by them prior to the *Lemon I* decision. "It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." 411 U.S. at 203. The majority saw its ruling as giving appropriate deference to federalism, noting the "general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." 411 U.S. at 208-09. Thus the Supreme Court applied its holding in *Lemon I* prospectively from the date of decision primarily to protect the financial reliance of the Pennsylvania schools affected. Although *Lemon II* is not a tax refund case and does not therefore provide direct and conclusive authority in this case, it provides the basis for applying the retroactivity analysis in the context of protecting state fiscal interests. *See also Cipriano v. Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (decision holding unconstitutional Louisiana's property-taxpayer limitation on franchise applied prospectively because retroactivity would impose significant hardship on cities, bondholders, etc.)

Numerous state courts have denied state tax refunds in cases where a tax was found unconstitutional. Chief among them is *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983). In that case, the Supreme Court of New Jersey found that state's Emergency Transportation Tax ("ETT") unconstitutional as in violation of the privileges and immunities clause of the Constitution, because it taxed New York residents at a higher effective rate on their New Jersey income than it taxed New Jersey residents. After so holding, the court not only made the decision prospective, but delayed the effective date of its holding until January 1 of the succeeding year, in order to allow state officials sufficient time to compensate for the loss of revenue.[8] 93 N.J. at 467-68, 461 A.2d at 1111.[9]

Given that the *Armco* decision represented a reversal of prior precedent, and that retroactive application of the *Armco* rule would cause severe hardship, estimated at $50 million in tax refunds if applied retroactively, we choose to apply the ruling

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8 We are mindful that the tax assessed against Ashland is not money that the State has collected and already spent, but rather a liability for tax asserted by the State. Our holding, however, affects all tax, both collected and assessed, on wholesale sales by out-of-state manufacturers.

9 Other cases refusing funds when declaring a state or local tax invalid include *Metropolitan Life Ins. Co. v. Comm'r*, 373 N.W.2d 399 (N.D. 1985); *Bond v. Burrows*, 103 Wash.2d 153, 164, 690 P.2d 1168, 1174 (1984); *Jacobs v. Lexington-Fayette Urban County Govt't*, 560 S.W.2d 10 (Ky. 1977); *Pellnat v. City of Buffalo*, 59 A.D.2d 1038, 399 N.Y.S.2d 788 (1977); *Hurd v. City of Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973), *aff'd*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974); *Gulesian v. Date County School Bd.*, 281 So.2d 325 (Fla. 1973); *Southern Pacific Co. v. Cochise County*, 92 Ariz. 395, 406, 377 P.2d 770, 778 (1963).

prospectively from the date of decision, June 12, 1984.[10] This means that there was no business and occupation tax on wholesale sales by out-of-state manufacturers made between June 12, 1984, and the date the statute was amended to remove the exemption for West Virginia manufacturers.

Although Ashland asserts that it raised the commerce clause argument from the beginning, it is clear from the record that the real dispute in this case has been nexus. Neither the Supreme Court's decision in *Armco* nor our decision today impairs Ashland's ability to litigate that issue and have its rights determined in the circuit court. Any benefit from the *Armco* decision would have been a windfall to Ashland. We believe, therefore, that the reliance of the State of West Virginia on a presumptively valid tax outweighs any injury that may be sustained by Ashland on account of our holding of prospectivity.

We, therefore, reverse the summary judgment and remand this case to the circuit court for further proceedings consistent with this opinion.

Reversed.

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10 In a purely prospective ruling, even the party who successfully litigates the issue does not benefit from the new rules. *See, e.g., Salorio v. Glaser, supra.* Traynor, *Quo Vadis, Prospective Overruling*, 28 Hastings L.J. at 546-47. If the *Armco* case were before us, we would have the opportunity to make such a ruling. The issue with respect to *Armco* is res judicata, however, and to subject to collateral attack. Also, we do not consider the application of prospectivity in criminal rights cases such as *People v. Boyd*, 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782 (1985), dispositive in a civil setting. Where a decision of unconstitutionality affects the life or liberty of a convicted criminal, the Supreme Court has extended the rules of prospective operation to include pending cases, while limiting retroactivity in order not to disturb final judgments in such considerations are not present in civil cases, and a strict rule of prospectivity may therefore be applied.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 12th day of November, 1986, the following order was made and entered, to-wit:

CA-81-2010
16962

ASHLAND OIL, INC., Petitioner Below,

Appellee

—vs.—

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER,
Respondent Below,

Appellant

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 25th day of February, 1985.

The Court having maturely considered the motion to reverse and the original record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered on the 25th day of February, 1985, be, and the same is hereby, set aside, reversed and annulled, and that the appellant, Herschel H. Rose, III, State Tax Commissioner, do recover of and from the appellee, Ashland Oil, Inc., his costs about the prosecution of his appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for further proceedings consistent with the written opinion aforesaid, and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Brotherton was concurred in by Chief Justice Miller, and Justices Neely, McGraw, and McHugh.

A True Copy

Attest: /s/ ANCIL G. RAMEY
Clerk Supreme Court of Appeals

Appendix E

ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA GRANTING SUMMARY JUDGMENT FOR APPELLANT

STATE OF WEST VIRGINIA

At a Circuit Court For Kanawha County held at the Court House thereof on the 25th day of February 1985.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. CA-81-2010

ASHLAND OIL, INC.,

Petitioner,

—v.—

HERSCHEL H. ROSE, III,
State Tax Commissioner,

Respondent.

ORDER

This cause having come on to be heard on motion of petitioner for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure for Trial Courts of Record and the court having considered the pleadings in the action, the record made before the State Tax Commissioner, the briefs submitted by the parties and having heard oral argument and having found that there is no genuine issue of fact to be submitted to the trial

court and having concluded that petitioner is entitled to summary judgment as a matter of law, it is hereby

ORDERED, that petitioner's motion for summary judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED that the ruling of the State Tax Commissioner appealed from is reversed and the assessment of additional business and occupation taxes against the petitioner for the period October 1, 1974 through September 30, 1976 (FYE September 30, 1975 and September 30, 1976) is null and void and held for naught.

Dated February 25, 1985

ENTER:

/s/ MARGARET WORKMAN
Judge Margaret Workman

Prepared by:

/s/ LARRY A. CARVER
Larry A. Carver
STATE TAX COUNSEL
ASHLAND OIL, INC.
P.O. Box 391
Ashland, Kentucky 41101

/s/ SUSAN C. WITTEMEIER
Susan C. Wittemeier
COUNSEL FOR ASHLAND OIL, INC.
GOODWIN & GOODWIN
1717 Charleston National Plaza
Charleston, West Virginia 25301

Inspected by:

/s/ GREGORY A. MORGAN
ASSISTANT ATTORNEY GENERAL
TAX DIVISION
435 West Wing
State Capitol Building
Charleston, West Virginia 25305

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

I, Phyllis J. Rutledge, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and seal of said Court this 9th day of December 1986.

/s/ PHYLLIS J. RUTLEDGE,
Clerk
Circuit Court
KANAWHA COUNTY, WEST VIRGINIA

Appendix F

ADMINISTRATIVE DECISION OF THE TAX DEPARTMENT OF WEST VIRGINIA

[SEAL]

State Tax Department of West Virginia
Charleston 25305

BEFORE THE TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA

BUSINESS TAX DIVISION

DOCKET #78-038 B

File No. 61 021 2250 001

In the Matter of the Petition of

ASHLAND OIL, INC.
1409 Winchester Avenue
Box 391
Ashland, Kentucky 41101

PRESIDING HEARING EXAMINER:
John L. Millar

PETITIONER REPRESENTED BY:
Larry A. Carver, Director State Tax Law
Donald R. Wheeler, Tax Attorney
Jerry Colvin, Supervisor
State Income Tax
David L. Campbell, Legal Intern

BUSINESS TAX DIVISION REPRESENTED BY:
Douglas Kilmer, Staff Attorney
Dale W. Steager, Director, Legal Division
Nick Ciccarello, Supervisor
Auditing Section

Martha Price, Accountant
Auditing Section

DATE, TIME AND PLACE OF HEARINGS:
June 12, 1978 9:30 A.M.
July 20, 1978 9:30 A.M.
August 24, 1978 9:30 A.M.
October 12, 1978 9:30 A.M.
State Tax Department
Office of Hearings and Appeals
1217 Quarrier Street
12~~17~~ Quarrier Street
Charleston, West Virginia 25301

ADMINISTRATIVE DECISION

An assessment for business and occupation tax was issued against Ashland Oil, Inc. (herein also referred to as the Petitioner or Ashland) on December 12, 1977 by Jon H. Snyder, Director of the Business Tax Division, pursuant to the lawful authorization of David C. Hardesty, Jr., then State Tax Commissioner, under the provisions of Chapter 11, Article 13 of the West Virginia Code. This assessment was for the fiscal years ending September 30, 1975 and September 30, 1976 for tax of $181,313.22 and penalty of $34,141.67, for a total assessed liability of $215,454.89.

The Petitioner timely filed a petition for reassessment. The matter was regularly set for hearing, and the Petitioner was served with notice of the hearing.

John L. Millar, a Hearing Examiner designated to hear the matter, determined that all proper notices and documents required by law had been timely filed and called the matter on to be heard at 9:30 A.M. EDT, on the 12th day of June, 1978, in the State Tax Department at Charleston, West Virginia. Three subsequent hearings were held in this matter on July 20, 1978, August 24, 1978, and October 12, 1978.

FACTS

Ashland Oil, Inc. is an integrated oil company engaged in a wide variety of business enterprises. Ashland is one of the nation's largest independent refiners and is a leading supplier of petroleum products to independent marketers in the industry. In addition, the Petitioner explores for and produces oil worldwide and gas in North America. Ashland manufactures and markets many chemical and petrochemical products and purchases chemicals for resale from other companies. It constructs and paves highways and streets as well as supplying the aggregates and other construction materials. Ashland has become a substantial coal producer and marketer since entering the field in 1969. It also operates extensive transportation facilities in connection with its petroleum, chemical and aggregate operations and as a contract carrier. In furtherance of its varied business enterprises, Ashland has acquired numerous locations worldwide, including West Virginia. In West Virginia, Ashland has plants, storage facilities, transportation facilities, retail gasoline stations, oil and natural gas production facilities, and retail and wholesale outlets for marketing various products. Sales into West Virginia are made from inventories located both within and outside this State. Ashland reported and paid business and occupation tax during the two audited years on gross income in excess of one hundred seventy-five million dollars. The Petitioner took industrial expansion credit on its fiscal year 1976 return in excess of one hundred ninety-six thousand dollars.

At the time of the resolution of a previous audit of Ashland, a meeting was held between representatives of Ashland and then Tax Commissioner Dailey, at which time it was agreed between the parties that a more complete, detailed audit would be conducted by the State. The purpose of this detailed audit was to enable the State and the Petitioner to prepare a proper case to litigate and decide many outstanding issues. This agreement was confirmed by Commissioners Goodwin and Hardesty, who served subsequently to Commissioner Dailey. At a meeting with Commissioner Hardesty, the parties further agreed, insofar as possible, to handle the case by stipulation

because of the complexity of Ashland's operations in West Virginia and the great number of witnesses that would be required to attend the hearings. It was the opinion of the parties that both time and expenses could be reduced by utilization of such stipulations.

A detailed audit was subsequently performed by the Business Tax Division, which disclosed various reporting errors under the production, manufacturing, retail, wholesale, service, and rents and royalties classifications. In several minor instances the auditor found that Ashland had overstated its income. The major reason for the assessed deficiency, however, was Ashland's failure to report its entire gross income derived from retail and wholesale sales made in West Virginia. The auditor utilized a test period of December, 1975 and April and August, 1976 to develop a percentage of sales with West Virginia destinations where the products sold were picked up by the customer outside West Virginia. Such transactions were not included as taxable sales in the audit. All other direct sales were included in the measure of tax.

At the time period of the audit, Ashland Oil, Inc. consisted of five major companies: Ashland Petroleum Company, Ashland Chemical Company, Ashland Construction Company, Ashland Exploration Company and Ashland Oil Canada. These companies were, in turn, comprised of more than thirty different operating divisions. While the record does not disclose how many divisions actually do business in West Virginia, Ashland protested the assessment only as to sales made by nine of these divisions—five in the Petroleum Company and four in the Chemical Company.

Following the issuance of the assessment, Ashland timely filed a petition for reassessment and objected to the adjustments made under the retail classification for fiscal year ending September, 1975 and under the wholesale sales classification for both fiscal years included in the audit. Ashland did not object to the other audit findings but did request waiver of the assessed penalties.

Counsel for the Business Tax Division and Ashland Oil, Inc. entered into nine separate stipulations covering the factual situations pertaining to the sales in questions. Brief oral testimony

and the introduction of these stipulations were made at four administrative hearings conducted by the Office of Hearings and Appeals.

The marketing operations of the nine divisions in question are carried out in a diverse manner. The following factors were identified by the parties as part of Ashland's marketing activities in West Virginia: local advertising, solicitation of orders, delivery by company-owned vehicles, providing technical advisors and marketing assistance, inventory and offices. In addition, a number of sales resulted through the transportation facility Ashland maintains at Kenova, West Virginia. To determine the specific manner in which sales were made in West Virginia by the individual divisions, Ashland formulated and utilized the term "Separately Identifiable Marketing Operation" ("SIMO") throughout the stipulations. A SIMO is defined in the stipulations "as being a unit of Taxpayer's operations having its own personnel and customers, which functions independently of and apart from other marketing units in the state". Joint Exhibit No. 1. For the nine divisions, Ashland identified seventeen marketing units, or SIMO's, each with a manager. While some divisions were analyzed by one SIMO, others were analyzed by two SIMOs. Ashland then further compartmentalized the seventeen SIMOs into thirty-three factual situations, to reflect the various ways sales were made within each SIMO. The various marketing factors (solicitation, inventory, etc.) described above were considered for each factual situation or compartment. In addition, Ashland also considered the factor of whether a salesman had the authority to accept orders; in no instance was such authority granted.

Sales made by Allied Oil Company may [be] used as an example to demonstrate the SIMO-compartment analysis prepared by Ashland. Allied Oil is a division of Ashland Petroleum Company, one of the five major companies of Ashland Oil, Inc. Allied Oil markets No.'s 2, 4 and 6 industrial fuel oil through two SIMOs. The first SIMO pertains to Allied's national account sales marketing operation, and the second SIMO pertains to its regional account operation. The national account sales operation was created to be responsible for accounts with major purchasers on a centralized basis. Ashland prepared an

analysis of the national account sales through four exhibits, each representing a different compartment or situation. In situation one (Exhibit A-1), Ashland noted no contacts were made in West Virginia for sales of fuel oil No.'s 2 and 6. In situation two (Exhibit A-2), Ashland noted only solicitation occurred in West Virginia for sales of fuel oil No.'s 2, 4 and 6. In situation three (Exhibit A-3), Ashland noted only an inventory was maintained in West Virginia from which sales of fuel oil No. 6 were delivered. Finally, in situation four (Exhibit A-4), Ashland noted that the only contact in West Virginia was movement of fuel oil No. 2 through its Kenova terminal to common carriers. Although in both situations two and three sales were made to Weirton Steel, an in-state customer, Ashland considered these sales different because, in the first instance, only solicitation occurred and, in the second instance, fuel was delivered from Ashland's facility at Follansbee, West Virginia. Ashland further noted that the only reason solicitation occurred in West Virginia in the first instance was because the home office of Weirton Steel is located in West Virginia. In its initial brief filed subsequent to the hearings, Ashland conceded that sales made in situation three were subject to business and occupation tax but contested the sales made in the remaining situations.

The second SIMO of Allied Oil described by Ashland pertains to certain regional account sales made in West Virginia. Ashland prepared two exhibits to distinguish the factual situations or compartments involved as to these sales. In the first situation (Exhibit B-1), Ashland noted that only solicitation occurred in West Virginia for sales of fuel oil No.'s 2, 4 and 6. Solicitation was accomplished through one non-resident salesman who generally spent no more than four days per month in West Virginia. Ashland described the solicitation activities as follows:

(1) Procuring of customer's bidding procedure, if any, and product demand.

(2) Providing information on availability of Taxpayer's products and current price schedules.

(3) Inquiring into delivery locations. (Joint Exhibit No. 1).

In the second situation (Exhibit B-2), Ashland noted that sales of fuel oil No.'s 2 and 6 differed from the first situation inasmuch as delivery of the products to Koppers Company and Kingsford Company, both in-state businesses, was made from the inventory maintained at Follansbee, West Virginia. Ashland noted that tax attributable to the transactions described in Exhibit B-2 had been paid and was not being protested.

Similarly, Ashland analyzed each of the remaining nine divisions by the use of one or more SIMOs. Each SIMO was in turn further broken down into one or more compartments supported by an exhibit. Of the thirty-three exhibits prepared by Ashland, it conceded that business operations in seven compartments were subject to tax by West Virginia. In these conceded situations, Ashland noted that more than one activity occurred in West Virginia, such as solicitation and delivery in-state, or local advertising, along with solicitation and rendering of technical assistance in-state.

While most of the SIMOs generally concerned the existence and extent of the above-listed nexus activities, Ashland made sales in two additional ways. The first situation pertained to the Petrochemical Division of Ashland Chemical Company. In addition to the regular sales of solvents and other products to industrial users, the Petrochemical Division sells propylene to the Novamont Corporation for use in its plant at Neal, West Virginia. A product stream of propylene and propane flows through Ashland's pipeline under the Big Sandy River from Ashland's plant at Leach, Kentucky to Novamont's plant at Neal, West Virginia. The product is furnished under the terms of a long-term contract between Ashland and Novamont which was negotiated outside West Virginia. At the Neal plant, Novamont extracts the propylene and utilizes it as a raw material in its facility. The propane is returned to Ashland's petrochemical center where it is placed in general storage with other propane produced in the refining and petrochemical processes. Ashland asserts that no other activity pertaining to these sales to Novamont occurs in West Virginia.

The second situation involves the Kenova Loading Facility. The Ashland Petroleum Company Division of Ashland Oil, Inc. maintains a major facility in Kenova, West Virginia—near

its Leach, Kentucky refineries—for the purpose of loading products produced at the refineries for shipment to various states, including West Virginia. This facility is commonly referred to as the Kenova facility, even though components thereof are located both in West Virginia and Kentucky. The facility, is maintained for the sole purpose of transportation and only used for storage as required for loading processes carried on at the facility.

The Kenova facility is composed of two units, one which serves barge transportation and one which loads tank cars belonging to the Norfolk & Western Railway Company. These units, in turn, are composed of pumps, pipelines, tanks and loading docks, with the pumping station which serves these units and a portion of the pipelines being located in Kentucky. The barge loading dock floats on the Ohio River.

Products are pumped from storage tanks located in Leach, Kentucky through a pipeline which crosses beneath the Big Sandy River to the loading tanks at Kenova, West Virginia. The major portion of this pipeline is in West Virginia. At the Kenova site, there are eighteen barge loading tanks with the capacity of holding 1,060,000 barrels of gasoline, kerosene and diesel fuel, and three rail loading tanks with the capacity of holding 9,000 barrels of diesel fuel. Products are accumulated at the barge loading facility to reduce the time it would take to load a barge directly from the refineries. In addition, many barges cannot be loaded directly from the Kenova refineries because the Big Sandy River is too shallow and narrow.

The railroad tank car loading dock was constructed at Kenova to service the Norfolk & Western Railway Company which had no trackage in the immediate vicinity of the refineries. This railroad is the only customer served by the rail loading dock.

Ashland Oil, Inc. owns and operates the facility to serve all of its operations as may be necessary. The Refinery Division of the Ashland Petroleum Company, through its refinery superintendent, controls and supervises all loading activities. The Petitioner notes no office, agency or place of business of this division exists in West Virginia for the railroad sales operation

because, as noted above, Ashland Oil, Inc., itself, maintains the facility.

Of the thirty-three factual situations or compartments described by Ashland, three compartments involved the Kenova loading facility. Sales were made by the Allied Oil Division to Appalachian Power Company (Exhibit A-4), and sales were made by the Refinery Sales Division to the Northfolk [sic] & Western Railway Company (Exhibit O-1) and to other refineries (Exhibit Q-2). The assessment included all sales which passed through this facility in which the destination was inside the State of West Virginia. No tax was assessed on sales in which the destination was to other states.

Additional facts pertaining to this case will be cited in the issue section of this decision to either clarify arguments or support findings.

ISSUES AND DETERMINATIONS

The principal issue raised for determination is whether the sales of Ashland Oil, Inc.'s [sic] included in the assessment are subject to business and occupation tax. Ashland earns substantial income in the State of West Virginia and has routinely filed returns and paid business and occupation tax on some of this income. The assessment included income which was not reported by Ashland Oil, Inc. Ashland conceded tax on a portion of these unreported sales but contested the tax on the remaining portion of sales.

Ashland does not object to the assessed tax on the four criteria cited by recent Court opinions as defenses under the Due Process and Commerce Clauses of the United States Constitution. These criteria are:

(a) Whether the activity is sufficiently connected to the State to justify a tax;

(b) Whether the tax is fairly related to the benefits provided the taxpayer;

(c) Whether the tax is fairly apportioned; or

(d) Whether the tax discriminates against interstate commerce.

See Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1977); *Moorman Manufacturing Company v. Bair*, 437 U. S. 267 (1978); *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U. S. 734 (1978); *J. C. Penney Co., Inc. v. Hardesty*, 364 S.E.2d 604 (1979). Ashland does not argue that there is a lack [of] benefits provided, that the tax is unfairly apportioned or that the tax discriminates against interstate commerce. Ashland also states that it "has a very pervasive presence in the state of West Virginia and that nexus, for whatever purpose and under any sort of test imaginable undoubtedly exists" (Petitioner's Reply Brief, p. 2).

Ashland instead argues that the present matter is not a nexus case but, rather, a case requiring an underlying connection between the taxpayer's activities in the State and the transactions sought to be taxed. Ashland relies extensively, and almost exclusively, on *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951) to invalidate the present tax assessment. Through the use of the SIMOs, Ashland has attempted to isolate its local activities into compartments, contending that it is not subject to tax because each compartment must be viewed separately without regard to the other compartments or to the taxpayer's entire activities within the State. These compartments were created by dividing Ashland Oil, Inc. into Companies, then into Divisions, then into SIMOs, and finally into thirty-three compartments. Ashland argues that a taxable connection must be found for each of the compartments in order to sustain the tax on the segment of the sales made in that particular compartment. Ashland concedes that there is a taxable connection for the sales made by seven compartments but asserts that there is no taxable connection for the remaining twenty-six compartments. Thus, Ashland argues *Norton* is dispositive of this case and supports its position that the sales in question are not subject to the business and occupation tax.

Upon a thorough analysis of the factual situation and applicable case law, it is determined that the *Norton* case is not dispositive of the taxability issue raised in the present assessment.

There is almost no similarity between the sales operations and activities of Ashland Oil, Inc. and the Norton Company. Furthermore, cases decided subsequent to *Norton* involve factual situations closer to Ashland's situation and espouse principles of law more applicable to the proper resolution of this case.

The *Norton* case, decided in 1951, involved a Massachusetts corporation which manufactured and sold abrasive machines and supplies. Norton derived gross receipts in the State of Illinois from sales resulting from three factual situations:

(1) Direct over-the-counter sales at a Chicago branch office;

(2) Mail orders filled in Massachusetts but received by and/or shipped in the Chicago office to its Illinois customers; and

(3) Mail orders sent directly to Massachusetts and filled by direct shipment to Illinois customers.

Norton paid taxes on its gross receipts under the provisions of the Illinois Retailers' Occupation Tax Act and subsequently filed a claim for refund of the taxes paid.

The Court, in rendering its opinion, first noted that "unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable." *Id.* at 537. Since Norton had satisfied this test by "having gone into the State to do local business", the Court next considered the question as to whether Norton's local activity was sufficiently related to the assertion of state tax power to justify the exaction. In order to resolve this question, the Court noted that the taxpayer has the burden of "showing that the particular transactions are dissociated from the local business and interstate in nature." *Id.* As to the three situations, the Court found that Norton had not established that the services rendered by the Chicago branch in situations (1) and (2) "were not decisive factors in establishing and holding this market. On this record, no other source of the customer relationship is shown." *Id.* at 538. As to the sales in category (3), the Court found that these sales could not be reasonably attributed to the local business. Thus, the Court ruled that the income derived from orders sent

directly to Worcester by the customer and shipped directly to the customer from Worcester was not subject to the Illinois tax.

In the *Norton* situation, the taxpayer maintained only one retail establishment and utilized no solicitors in Illinois to work the territory out of either the home office or the Chicago branch office. In the present situation, Ashland utilizes extensive contacts in this State to establish and hold the market for its sales. As previously noted, Ashland has plants, storage facilities, transportation facilities, numerous retail gasoline stations, oil and natural gas production facilities, and retail and wholesale outlets for marketing various products. Ashland utilizes local advertising, solicitation of orders, delivery by company-owned vehicles, technical advisors and marketing assistance, inventories and offices in this State to promote its sales. Ashland itself notes that it "has a very pervasive presence in the State of West Virginia and that nexus, for whatever purpose and under any sort of test imaginable undoubtedly exists." Petitioner's Reply Brief, p.2.

Ashland's two companies, Ashland Chemical Company and Ashland Petroleum Company, which made the contested sales in West Virginia, also have extensive operations in this State in their own right. Although Ashland's representative stated that

> The only property of any kind which the chemical company has in the state that we were able to discover is the pipeline which runs from Ashland's refinery and petrochemical center at Leach, Kentucky, across the Big Sandy River, I think it is Neal, West Virginia. We are not able to discover any other property of any kind in the state. (Tr. of July 20 Hearing, pp 14-15),

the returns filed by Ashland for the two audited years disclose that the Chemical Company had industrial expansion on two facilities in West Virginia. On its return filed for fiscal year ending September 30, 1975, Ashland claimed industrial expansion credit for a conveyor and loadout facility at its Chemical Company plant located at Hansford, West Virginia. On its return filed for fiscal year ending September 30, 1976, Ashland claimed industrial expansion credit for its new Chemical Company plant opened at Neal, West Virginia. Ashland stated in its

Schedule C that Total Qualified Investment of this plant was $20,399,976.00. In addition, Ashland employed solicitation for its Chemical Company sales made in West Virginia.

Over ninety per cent (90%) of the assessed liability arose from the sales made by the Ashland Petroleum Company. This Company maintains an inventory at Follansbee, West Virginia and supervises the Kenova Loading Facility. A portion of this Company's sales are made through a retail outlet located in Charleston, West Virginia. The Petroleum Company utilizes all of the sales activities previously mentioned for Ashland Oil, Inc.

Therefore, it is determined that the factual situation in this case is clearly not similar to the factual situation present in the *Norton* case. Considering Ashland by itself or the two Companies by themselves, the sales in question were made through many more contacts than the one in-state office with no territorial solicitation, found in *Norton*.

The Court opinions decided subsequent to *Norton* involve factual situations closer to that of the present case, and espouse principles of law more applicable to the proper resolution of this case. In 1964, the Supreme Court handed down its opinion in *General Motors Corporation v. Washington*, 84 S. Ct. 1564 (1964). At issue there was the State of Washington's business and occupation tax as applied to the gross wholesale price of motor vehicles, parts, and accessories shipped by General Motors into the State. The activities of General Motors in the state were extensive: it engaged in promotional and supervisory work through its local employees to further sales and preserve the quality of its dealer organization, it maintained a warehouse in Seattle from which the Chevrolet, Pontiac and Oldsmobile dealers obtained a portion of their parts and accessories, and it had a local branch office which assisted Washington dealers in securing better service for its orders.

The taxpayer in *General Motors* conceded and paid the tax on the orders filled at the Seattle warehouse but contested the tax on the sale of items shipped from out of state. The items in question were sold by four divisions of General Motors (Pontiac, Oldsmobile, Chevrolet and General Motors Parts) to independent dealers who directly ordered the items from

out-of-state manufacturing plants. As a general rule, the sales and orders were handled and approved by zone offices in Portland, Oregon. As noted by the dissenting opinion, the transactions could be divided into the following three categories:

> (1) Pontiac and Oldsmobile Divisions Sales: These Divisions had no office, establishment or intrastate business in Washington; they operated entirely through Portland zone offices and the Washington sales representatives.
>
> (2) General Motors Parts Division Sales: This Division maintained warehouses in both Seattle, Washington, and Portland, Oregon. The Seattle warehouse sold directly to local Washington dealers and the tax imposed on such sales has been paid and is not disputed here. The sales to Washington dealers of parts and accessories ordered from and delivered by the Portland warehouse were, however, also taxed and those taxes are disputed here.
>
> (3) Chevrolet Division Sales—"Class A and B" Sales: The Chevrolet Division maintained a one-man branch office in Seattle, Washington; and all sales within the territorial jurisdiction of that office have been referred to in this litigation as "Class A" transactions. This one-man office operated under the direction of the Portland zone office and conducted no business in the State of Washington other than to facilitate the management and handling of sales and orders through the Portland zone office. The Seattle office, however, dealt only with Washington's northern counties and did not deal with nine of Washington's southern counties; the sales to dealers in those southern counties have been labeled "Class B" sales and had no connection with Chevrolet's Seattle office. The "Class B" sales were therefore similar to those in category (1) above. *Id.* at 1574.

In rendering its opinion, the Court appeared to reiterate the *Norton* rule, but with an added twist. Whereas in *Norton*, the Court had stated that once a taxpayer had come into the state to do local business, it could avoid taxation "only by showing that particular transactions are disassociated from the local business

and interstate in nature," *Norton*, *supra* at 380, in *General Motors* it stated that the taxpayer had "the burden of showing the operations of these divisions in the State 'are disassociated from the local business and interstate in nature.' " *General Motors*, *supra* at 1568.

The Court stated:

> Thus, in the bundle of corporate activity, which is the test here, we see General Motors' activity so *enmeshed in local connections* that *it voluntarily paid taxes on various of its operations but insists that it was not liable on others*. Since General Motors elected to enter the State in this fashion, we cannot say that the Supreme Court of Washington erred in holding that these *local incidents were sufficient to form the basis for the levy of a tax* that would not run contrary to the Constitution. *Norton Co. v. Department of Revenue*, *supra*.
>
> The tax that Washington levied is measured by the wholesale sales of the respective General Motors divisions in the State. It is unapportioned and, as we have pointed out, is, therefore, suspect. We must determine whether it is so closely related to the local activities of the corporation as to form "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. Ed. 744 (1954). On the basis of the facts found by the state court we are not prepared to say that its conclusion was constitutionally impermissible. *Norton Co. v. Department of Revenue*, *supra*, 340 U.S. at 538, 71 S. Ct. at 380. Here, just as in Norton, the corporation so mingled its taxable business with that which it claims nontaxable that we can only "conclude that, in the light of all the evidence, the judgment attributing * * * [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered * * * [through in-state activity] were not *decisive factors in establishing and holding this market*." *Ibid.* Although mere entry into a State does not

> take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a *maze of local connections* as does General Motors, and take advantage of its gain on domesticity, and still maintain the same degree of immunity. (Emphases added) *Id.* at 1571-1572.

As noted by Hellerstein:

> By inquiring whether the aggregate of corporate activity giving rise to disputed sales had sufficient local connections, the Court abandoned a nexus standard requiring that taxable receipts emanate from transactions with a tangible and demonstrable link to local activities. Hellerstein, *State Taxation of Interstate Business and Steel The Supreme Court, 1974 Term: "Standard Pressed Steel" and "Colonial Pipeline"*, 62 Va. L. Rev. 149 at 165 (1976).

The dissent in *General Motors* asserted that the sales of General Motors divided into the three categories previously cited should be compared to the situation in *Norton*. The dissent further asserted that by using the *Norton* test, the sales in categories (1) and (3) should be eliminated from the measure of the tax as well as the items sold in category (2) from the Portland warehouse. But the majority did not accept this comparison. It adopted the "bundle of corporate activity" test and found the gross receipts of all the divisions were subject to the business and occupation tax.

General Motors was followed by *Standard Pressed Steel Co. v. Washington Department of Revenue*, 95 S. Ct. 706 (1975). Standard Pressed Steel was a manufacturer of aerospace fasteners, with a home office and manufacturing plant in Pennsylvania and another plant in California. Standard's activities in the State of Washington consisted of a single resident employee, Martinson, and a group of non-resident engineers who visited the State approximately twenty-five (25) days per year. None of Standard's local activity was directly involved with the transactions in question. Orders, shipments, negotiations and payments were all handled between Boeing, the principal customer, and Standard. The unanimous Court found that Martinson's critical role in making "possible the realization and continuance of valuable contractual relations between appellant and Boeing," *id.* at 708, created a sufficient link between Standard's in-state activities and its Washington sales to sustain a tax upon all of them. While the Court mentioned the divided opinion rendered in *Norton*, it found the *General Motors* case to be almost precisely in point.

The final case involving a factual situation closer to Ashland's activities is the *J. C. Penney*, case recently handed down [by] the West Virginia Supreme Court of Appeals. J. C. Penney operates sixteen hundred stores throughout the United States, including fifteen stores located in West Virginia. The taxpayer principally derives income in West Virginia from over-the-counter sales, catalogue sales, and finance charges on credit sales. As explained by the Court:

> Catalogue sales are made in two ways—by direct mail and through catalogue desks in Penney's stores. All catalogue sales fall into four categories: customer orders at local catalogue desks where the merchandise is delivered to the local store for delivery to the customer; customer orders at the local store where the merchandise is delivered from out-of-state by mail or interstate carrier directly to the customer; customer orders through the mail direct to the local catalogue center where the customer then picks up the merchandise; and, customer orders by mail direct to the out-of-state catalogue center where the merchandise is delivered back to the customer by mail or interstate carrier. *Id.* at 609.

J. C. Penney paid tax on the over-the-counter sales and only contested on appeal the last category of catalogue sales and the finance charges on its direct mail credit sales. These disputed catalogue sales are analogous to the mail order sales deemed not taxable in *Norton*. In upholding the business and occupation tax on J. C. Penney's entire gross receipts, the Court found:

> Like the manufacturer in *Standard Pressed Steel*, *supra* the activities of the taxpayer are greatly facilitated by its overall operations in West Virginia; there are sufficient contacts with the State to support a tax nexus; and, all of the criteria of *Complete Auto*, *supra* in terms of fair apportionment, nondiscrimination, and the reasonable relationship to the services provided by the State have been met.

Justice Miller in his concurring opinion in *J. C. Penney* presented the following analysis of the *Norton* case:

> As is often the case in state tax controversies involving interstate commerce, each party cites the same decisions as supporting its particular position. The heart of the controversy is whether *Norton v. Department of Revenue*, 340 U.S. 534, 71 S. Ct. 377, 95 L.Ed. 517 (1951), applies to invalidate these two particular taxes.
>
> * * *
>
> *Norton* is, of course, persuasive to the position of the taxpayer here, but it was followed by *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed.2d 430, (1964). *Id.* at 616.

After reviewing the legal principles espoused in both *General Motors* and *Standard Pressed Steel*, Justice Miller further concluded:

> It can be readily seen that *Norton*'s test, whether there is some local service to support the state tax on a particular transaction, has been transformed by *General Motors* and *Standard Pressed Steel* into an inquiry as to the extent of the local business of the taxpayer, which is another way of determining the amount of local services the state extends to the taxpayer. Once a substantial local connection is found, then a tax will be upheld if it bears some reasonable apportionment to the local activity.
>
> The *taxpayer cannot escape taxation by attempting to isolate his local activities into compartments and by contending that each compartment must be viewed separately*

> *without regard to the taxpayer's entire activities within the state*. In both *General Motors* and *Standard Pressed Steel*, the taxpayer's in-state activities were thought to be sufficient to uphold the tax even though these activities did not have a substantial direct relationship to the activity taxed.
>
> Penney, through its argument that its direct catalog sales have no local connection, attempts to isolate a small area of its overall activity in the State and asks that we merely look at this local nexus. We cannot, however, ignore Penney's substantial business activity through its numerous retail outlets in this State. Moreover, the record demonstrates that its out-of-state direct catalog sales are so closely entwined with its local presence that any attempt to isolate these sales would do violence to customary retailing concepts.
>
> * * *
>
> Penney's finance charges on credit sales in West Virginia are taxable under the same analysis that applies to its out-of-state catalog sales. From a legal standpoint, once its substantial local presence is established, Penney is subject to a fairly apportioned tax on all of its activities within the State, *regardless of whether a particular aspect, in isolation, may have fewer local connections*. (Emphases added) *Id.* at 617-618.

Thus, on the one hand there is the *Norton* factual situation of one office and direct mail service and on the other hand the *General Motors—J. C. Penney* situation of multiple divisions of one company doing business in the state. Ashland clearly falls into the latter situation.

Applying the legal principles formulated in the *General Motors* case and followed in *Standard Pressed Steel* and *J. C. Penney*, it is determined that the entire gross receipts included in the assessment are subject to the business and occupation tax. Ashland has entered the State of West Virginia and engaged in activities herein. It voluntarily pays considerable taxes on its West Virginia operations (over one-hundred seventy-five million dollars in gross income during the two audited years). The bundle of Ashland's corporate activity is so

extensive that even Ashland fails to protest the lack of nexus. Although Ashland has artificially divided its sales into compartments, it has failed to establish that its services were not substantial "with relation to the establishment and maintenance of sales, upon which the tax was levied," *General Motors*, *supra*. at 1571.

Ashland "cannot escape taxation by attempting to isolate" its "local activities into" Companies, then into Divisions, then into SIMOs and finally into thirty-three compartments "and by contending that each compartment must be viewed separately without regard to the taxpayer's entire activities within the State." *J. C. Penney*, *supra* at 617. As noted by the Court in *Mobil Oil Corp. v. Com'r of Taxes of Vermont*, 100 S. Ct. 1223 (1980):

> [I]t becomes misleading to characterize the income of the business as having a single identifiable "source". Although separate geographical accounting may be useful for internal accounting, for the purposes of State taxation it is not constitutionally required. *Id*. at 1232.

Even to view the sales made by the two Companies as separate transactions does not support Ashland's position. Both of these Companies had far more in-state activities than the four divisions in *General Motors* and the catalog and credit divisions in *J. C. Penney*. Therefore, it is determined that the *Norton* case is not dispositive of the issue raised in this case, and furthermore that the sales made by Ashland Oil, Inc. are subject to business and occupation tax under the principles of law formulated and applied in *General Motors*, *supra*, *Standard Pressed Steel*, *supra*, *Complete Auto Transit*, *supra*, and *J. C. Penney*, *supra*.

The second issue raised for determination pertains to the penalties assessed on the deficiency. It is determined that the penalties relating to the conceded items must be affirmed. The Petitioner has raised viable legal arguments to the remaining items in the assessment and it is determined that reasonable cause exists for waiver of the penalty on these items.

WHEREFORE, it is the DECISION of Herschel H. Rose III, Tax Commissioner of the State of West Virginia that the assessment for business and occupation tax issued against Ashland for the fiscal years ending September 30, 1975 and September 30, 1976 in the amount of $181,313.22, with revised penalties thereon in the amount of $2,620.52, for a total liability in the amount of $183,933.74 should be and is hereby affirmed as modified.

/s/ HERSCHEL H. ROSE III
Herschel H. Rose III
State Tax Commissioner

4/21/81
Date Rendered

Appendix G

NOTICE OF APPEAL

NOTICE OF APPEAL

Civil Action No. 81-C-2010

In The

CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

ASHLAND OIL, INC., a corporation,

Plaintiff,

—v.—

HERSCHEL H. ROSE, III, West Virginia State Tax Commissioner and the West Virginia State Tax Department,

Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ashland Oil, Inc., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the Order of the Circuit Court of Kanawha County, West Virginia, which was entered in this proceeding on January 12, 1988 and became final on June 15, 1988, affirming the determination and assessment by the Tax Commissioner of West Virginia of Business and Occupation Tax claimed to be due and owing the State by Ashland Oil, Inc.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Filed
88 Aug.-3 P.M. 1:40

/s/ CATHY GASTON
Cathy Gaston, Clerk
Kanawha County Circuit Court

AFFIDAVIT OF SERVICE

State of West Virginia,
County of Kanawha, To-Wit:

I hereby certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only parties required to be served by mailing a true copy thereof to the Appellant's attorneys, Charles G. Brown, Attorney General, addressed to him at the Attorney General's Office, State Capitol, Charleston, West Virginia 25305, and Gregory A. Morgan, Special Assistant Attorney General, addressed to him at Young, Morgan & Cann, Suite One, Schroath Building, Clarksburg, West Virginia 26301, both in the regular United States mail, postage prepaid, this 3rd day of August, 1988.

SUSAN C. WITTEMEIER, ESQUIRE
Susan C. Wittemeier, Esquire
Goodwin & Goodwin
1500 One Valley Square
Charleston, West Virginia 25301
Telephone: (304) 346-7000
Counsel for Plaintiff

Taken, subscribed and sworn to before me, a Notary Public in said county and state, this 3rd day of August, 1988.

/s/ SALLY AILEEN LUDURG
Notary Public, Kanawha County,
West Virginia

My commission expires *March 29, 1993*

Appendix H

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

United States Constitution, Fourteenth Amendment (the "Due Process Clause"):

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

United States Constitution, Article VI:

* * * *

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

West Virginia Code:
§ 11-10-8(a) and (b)(1986)

> (a) *Notice of assessment.* The tax commissioner shall give the taxpayer written notice of any assessment or amended or supplemental assessment made pursuant to this article. The assessment or amended or supplemental assessment, as the case may be, shall become final and conclusive of the liability of the taxpayer and not subject to either administrative or judicial review under the provisions of sections nine or nine-a, and ten of this article unless the taxpayer to whom a notice of assessment or amended or supplemental assessment, is given, shall

within sixty days after service thereof (except in the case of jeopardy assessments, as to which the time for filing a petition is specified in section seven) either:

(1) *Petition for reassessment.*—Personally or by certified mail, files with the tax commissioner a petition in writing, verified under oath by the taxpayer or his duly authorized agent having knowledge of the facts, setting forth with particularity the items of the assessment objected to, together with the reasons for such objections; or

(2) *Payment of assessment.*—Personally or by certified mail, remits to the tax commissioner the total amount of the assessment or amended or supplemental assessment, including such additions to tax and penalties as may have been assessed and the amount of interest due.

(b) *Finality of assessment.*—The amount of an assessment or amended or supplemental assessment shall be due and payable on the day following the date upon which the assessment or amended or supplemental assessment becomes final. Payment of the amount of the assessment, or amended or supplemental assessment, as provided in subdivision (2), above, within sixty days after service of notice of such assessment shall not prohibit or otherwise bar the taxpayer from filing a claim for refund or credit under the provisions of section fourteen of this article within the time prescribed therein for the filing of a claim for refund or credit.

§ 11-10-9(1978)

When a petition for reassessment provided for in section eight of this article, or a petition for refund or credit provided for in section fourteen of this article, is filed within the time prescribed by said sections for such filing, or a hearing is requested pursuant to the provisions of any other article of this chapter which is administered under this article, the tax commissioner shall assign a time and place for a hearing upon the same and shall notify the petitioner of such hearing by written notice at least twenty

days in advance thereof. Such hearing shall be held within ninety days from the date of filing the petition or other written request for hearing unless continued by agreement of the parties or by the tax commissioner for good cause.

The hearing shall be informal and shall be conducted in an impartial manner by the tax commissioner or a hearing examiner designated by him. If the hearing is on a petition for reassessment the burden of proof shall be upon the taxpayer to show the assessment is incorrect and contrary to law, either in whole or in part. If the hearing is on a petition for refund or credit, the petitioner shall also have the burden of proof.

After any hearing as above provided for, the tax commissioner shall, within a reasonable time, give notice in writing of his decision. Unless an appeal from the decision of the tax commissioner rendered in any such hearing is taken, pursuant to the provisions of section ten of this article, within sixty days after service of such notice, the tax commissioner's decision shall become final and conclusive and not subject to either administrative or judicial review. The amount, if any, due the State under such decision shall be due and payable on the day following the date upon which such decision becomes final. The amount, if any, due the taxpayer under such decision shall be promptly refunded, or the same may be credited pursuant to section fourteen of this article.

§ 11-10-10(a)(1978)

(a) *Right of appeal.* A taxpayer may appeal the administrative decision of the tax commissioner issued under section nine or fourteen of this article, by taking an appeal to the circuit courts of this state within sixty days after being served with notice of the administrative decision.

Appendix I

DESIGNATION OF CORPORATE RELATIONSHIPS

Ashland Oil, Inc., filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Ashland Oil, Inc. is not owned by any parent corporation.

Ashland Oil, Inc. has an ownership interest in the following subsidiaries:

A. B. & H. Processing, Inc.
Allegheny Land Company
Arch Cartage Corporation
Arch Coal Properties, Inc.
Arch Coal Sales Company, Inc.
Arch Construction, Inc.
Arch Hurricane Company, Inc.
Arch Mineral Coal Company
Arch Mineral Coal Sales Company
Arch Mineral Corporation
Arch Of Alabama, Inc.
Arch Of Illinois, Inc.
Arch Of Kentucky, Inc.
Arch Of Utah, Inc.
Arch Of West Virginia
Arch Of Wyoming, Inc.
Arch On The Green, Inc.
Arch On The North Fork, Inc.
Arch Phoenix Coal Company
Arch Service Corporation
Arch Yellow Creek Corporation
Ark Land Company
Ashland Coal, Inc.
Ashland Coal International Ltd.
Ashland Coal Sales (Ohio), Inc.
Ashland Polymers Pty. Ltd.
Ashland Südchemie Giesserei-Chemikalien GmbH
Ashland Terminal, Inc.

Ashland-Avebene S.A.
Ashland-Südchemie-Kernfest GmbH
B. V. Ashland-Sudchemie V.H. Necof
Cavalier Coal Terminal Company
Clay-Nicholas Minerals Company, Inc.
Cloverlick Land Company
Cloverlick Mining Company
Compagnia Tecnica Meridionale, S.R.L. (COTEM)
Cutler Mining, Inc.
Dana Coal Company
Devon Chemicals, Inc.
DMA Technical Consultants, Inc.
DMJM/Thomson Ltd.
Drennen Tipple Corporation
Drew Ameroid (M) SDN. BHD.
Energy Development Co.
Etablissement Locab
Filbeth Enterprises, Inc.
Ford Dock, Inc.
Hawkeye Coal Company
Hawkeye Services Corporation
Hobet Mining, Inc.
Hodogaya Ashland Co., Ltd.
Huntington Rail & River Corp.
Iberia Ashland Chemical S.A.
James River Coal Terminal Company
Julian Tipple, Inc.
Kanawha Minerals Company, Inc.
Kernfest-Webac, A.B.
Lasalle Coal Co.
Mahogany Point Minerals Company
Midlands Chrome Mines (Private) Limited
Mountain Mining, Inc.
Mountaineer Land Company
Natomas Coal Company
P.C. Holding, Inc.
Pipestone Creek Mining Co.
Platt River Mining Co.
Polytecna Harris S.P.A.

Prince Carsaar Coal Sales Ltd.
Putnam Minerals Company, Inc.
R&H Service and Supply Co.
River Cities Leasing, Inc.
Saarcar Coal, Inc.
Servco, Inc.
Stovall-Files Coal Company, Inc.
Sunbru, Inc.
Superamerica of Florida, Inc.
TMSI Arabia Ltd.
Tongue River Holdings, Inc.
Tongue River Resources, Inc.
Tri-State Terminals, Inc.
Tri-State Testing Co., Inc.
United States Coal Company
WEBACEM OY
WICMAP Transport Pty. Ltd.
WK Minerals, Inc.

Ashland Oil, Inc. does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries).

Ashland Oil, Inc. does not have any affiliates.

Dated: September 9, 1988.

MOTION

No. 88-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASHLAND OIL, INC.,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner of the State of West Virginia,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether questions of civil retroactivity are governed by the standard enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

2. Whether the rules announced in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied prospectively.

3. Whether a taxpayer can avoid taxation by artificial compartmentalization of its business activities under *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951).

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No. 88-421

ASHLAND OIL, INC.,

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v.

HERSCHEL H. ROSE, III,
Tax Commissioner
of the State of West Virginia,

Appellee.

**ON APPEAL FROM THE
CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA**

MOTION TO DISMISS OR AFFIRM

This appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that this appeal does not present a substantial federal question, that the judgment below rests on an adequate nonfederal basis as well as other grounds which this appellee will present herein, all of which establish that the Court should not set this case for argument.

OPINIONS BELOW

The Opinion and Final Order of the Circuit Court of Kanawha County, West Virginia, dated January 12, 1988, is not officially reported. A copy is reproduced in the Appendix attached to appellant's Jurisdictional Statement, [J.S.]

The opinion below by Justice Brotherton of the Supreme Court of Appeals of West Virginia is reported as *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986). A copy of the opinion below is set out in full in the Appendix, attached to appellant's Jurisdictional Statement. [J.S.]

The order of the Circuit Court of Kanawha County granting the appellant summary judgment dated February 25, 1985, and the Administrative Decision of the Tax Commissioner of the State of West Virginia dated April 21, 1981, are set out in full in the Appendix attached to the appellant's Jurisdictional Statement [J.S.].

JURISDICTION

Ashland Oil, Inc. here seeks to appeal two separate decisions, one of which is a decision of the Supreme Court of Appeals of West Virginia reversing the Circuit Court of Kanawha County, West Virginia, which applied this Court's decisions in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), on a prospective basis from June 12, 1984. Appellant evokes the jurisdiction of this Court under 28 U.S.C. § 1257(2) (1982), "[b]ecause a decision of the Circuit Court upholds the application of a state statute against a challenge under the United States Constitution." J.S. at 2. There

is here, however, no constitutional challenge as to the prospectivity issue.

The Court below agreed with the appellant that the taxing scheme at issue was unconstitutional as violative of the Commerce Clause and that it was invalidated by *Armco*. The issue presented to this Court is whether prospective application is proper under the circumstances. As such, appellant's assertion of jurisdiction is invalid.

This Court has recognized that questions of retroactivity are not constitutional in nature. *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932) *United States v. Johnson*, 457 U.S. 537 (1982). As to the issue of prospectivity, no question exists where a state statute has been "drawn in question." The lower court did not uphold a state statute in the face of a constitutional challenge, and this appeal is not within the jurisdiction of 28 U.S.C. § 1257(2). Accordingly, this appeal should be dismissed as to the prospectivity issue, or, in the alternative, considered as a Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Ashland Oil, Inc. is an Ohio Corporation (hereinafter sometimes referred to as "Taxpayer" or "Ashland"), qualified to hold property and do business as a foreign corporation in the State of West Virginia. During the period in question, Ashland carried on extensive business activities in West Virginia. As a result of such activities, David C. Hardesty, Jr., then Tax Commissioner of the State of West Virginia, predecessor in office to the appellee herein, Michael E. Caryl, (hereinafter sometimes referred to as "the Appellee" or "the Commissioner"), issued a Notice of Assessment of tax against appellant, Ashland, for

business and occupation tax for the fiscal years ending September 30, 1975, and September 30, 1976, for tax in the amount of $181,313.22, with penalty added in the amount of $34,141.67, for a total assessed tax and penalty of $215,454.89.

Administrative hearings were held on several days in 1978. By Administrative Decision dated April 21, 1981, Commissioner Rose determined that the Taxpayer was indebted to the State of West Virginia for tax in the revised amount of $183,933.74. On May 26, 1981, the Commissioner was served with the Notice of Appeal by which the Taxpayer sought review of the Administrative Decision by the Circuit Court of Kanawha County, West Virginia. By agreement, the parties submitted briefs to the Circuit Court in support of their respective positions. Following oral argument on August 27, 1982, the case was submitted for decision.

Two years later, in October 1984, subsequent to this Court's decision in *Armco*, Taxpayer moved for summary judgment based on the discrimination rulings in *Armco*. After hearing held January 21, 1985, and after denying the Commissioner's request to file a supplemental brief on the impact of the *Armco* decision, the Circuit Court granted the summary judgment motion, thereby annulling the assessment.

Prior to June 12, 1984, the date of issuance of this Court's decision of *Armco*, the issues presented to the Circuit Court, and prior to that at the administrative level, revolved solely around whether certain of Ashland's business activities within West Virginia constituted sufficient nexus such that the business and occupation tax could be constitutionally levied on its wholesale sales to West Virginia customers. The

Armco case involved nexus issues which are highly significant and relevant to the case at bar and which were addressed and argued before this Court. Such issues were not addressed because this Court determined that the taxing scheme was facially discriminatory. At the Circuit Court level, the parties here had considered the resolution of these nexus issues to be the only issue to be resolved.

The West Virginia Supreme Court of Appeals, by decision dated November 12, 1986, reversed the Order of the Circuit Court and applied the *Armco* decision prospectively from June 12, 1984, holding that "the reliance of the State of West Virginia on a presumably valid tax outweighs any injury that may be sustained by Ashland on account of our holding of prospectivity." The Court also remanded the remaining nexus issues herein to the Circuit Court for further proceedings. Ashland interrupted the Circuit Court's consideration of the nexus issue by appealing the Supreme Court of Appeals' ruling on prospectivity to this Court. That appeal was dismissed for want of a final judgment by Order entered on April 27, 1987.

The Circuit Court was finally able to consider the remaining issue of nexus on January 12, 1988. In ruling in favor of the Commissioner, Judge MacQueen found that Ashland's business activities within West Virginia, when viewed as a whole, constituted sufficient nexus to uphold the assessment of tax (J.S. 1a). The Supreme Court of Appeals refused to hear Ashland's Petition for Appeal by Order dated June 15, 1988 (J.S. 10a).

The facts in this case as adopted by the Circuit Court are based on the nine stipulations entered into by the parties at the administrative level. The Ad-

ministrative Decision sets out these stipulations in a narrative form. J.S. 31a-37a.

ARGUMENT

I. THE WEST VIRGINIA SUPREME COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARDS FOR PROSPECTIVE APPLICATION OF NEW RULES IN CIVIL CASES.

A. THIS COURT PREVIOUSLY HAD THE OPPORTUNITY TO DECIDE THE QUESTION OF PROSPECTIVITY AND DECLINED TO DO SO.

This issue comes before the Court as an appeal from the ruling of the West Virginia Supreme Court of Appeals holding that this Court's decision in *Armco* is to be applied on a prospective basis to taxes accrued after the date of that decision, June 12, 1984. The court below found that the assessment against Ashland came within this Court's holding in *Armco*, but, employing the analysis enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), found that prospective application was proper.

The West Virginia Court was presented with the prospectivity issue as a result of this Court's October 9, 1984 denial of the Commissioner's Petition for Rehearing filed subsequent to *Armco*. The Petition for Rehearing had initially raised the issue of prospective application. Relying on *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the West Virginia Court properly interpreted that resolution of the prospectivity question had been referred to it by this Court. *Bacchus*, decided on June 29, 1984, two weeks after *Armco*, held that the issue of remedies or refunds when a state tax is found unconstitutional are frequently interwined with state law and is better resolved at the

state level. This position was subsequently followed in *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862 (1985), and *Williams v. Vermont*, 105 S. Ct. 2465 (1985).

The West Virginia Court responded to this issue by reversing a summary judgment granted in favor of Ashland by the Circuit Court of Kanawha County, WV. The court properly believed that it was to consider and determine the issue of an appropriate remedy under the circumstances. In doing so, it ruled that the *Chevron* standard applied, and found that under the *Chevron* criteria, *Armco* should be applied to all taxable periods after the date of its announcement, June 12, 1984. The periods at issue here are Ashland's fiscal years ending on September 30, 1975, and September 30, 1976. Ashland relies on the notion that the lower court should have made a distinction between cases where the remedy sought is a refund of tax already paid and where, as here, the taxing authority has after audit, asserted a liability for tax due for the period in question.

In *Tyler Pipe Industries v. Washington Department of Rev.*, 107 S. Ct. 2810 (1987), this Court had another opportunity to address the question of the proper remedy to be applied when a state tax scheme is held unconstitutional. In that case in which Washington argued in favor of prospective application because the taxes were assessed prior to *Armco* the Court again, citing *Bacchus* and *Williams*, declined to express an opinion with regard to the merits of what might be a proper remedy and remanded the issue to the state court for consideration. That issue has been resolved by the Washington Court, which applied the *Chevron* criteria and found prospective application to be the

appropriate remedy. *National Can Corp. v. Washington Department of Rev.*, 749 P.2d 1286 (Wash. 1988) *cert. denied*, 100 L.Ed. 615 (1988).

Ashland's position that *Bacchus*, *Williams* and *Tyler Pipe* are distinguishable because it is not here seeking a refund is wrong. In those cases, the Court's objective was to fashion an appropriate remedy in light of how the decisions to be applied might interact with state law. The refund/assessment distinction, however, rests on just such an issue. Ashland claims that since it has not previously paid the tax in question, there is no final judgment and therefore, the issue of retroactivity should not have been considered by the West Virginia Court. The fact that West Virginia law allows a taxpayer to contest an assessment by posting adequate security of the tax (*see* W. Va. Code § 11-10-10), rather than requiring payment of the assessment or asserted liability and contesting the liability by filing a petition for refund is a distinction with no substantial difference. This is exactly the sort of state law issue which prompted this Court to remand the issue in *Bacchus*, *Williams* and *Tyler Pipe*. The West Virginia Court recognized that Ashland was contesting an assessment, rather than seeking a refund and saw no substantive difference in the two, since the interest being considered, the state's fiscal integrity, is the same.

Ashland's argument also ignores the fact that the activities and transactions at issue here took place from October 1, 1974, through September 30, 1976, long before *Armco* was decided. The West Virginia Court's decision draws a bright line distinguishing tax liabilities accrued prior to June 12, 1984, and those occurring afterward. The lower court expressly recognized that between June 12, 1984, and the effective date of the statutory revision removing the constitutionally offensive exception struck down in *Armco*, there would be no wholesale sales tax whatsoever. J.S. 11a. All of the transactions at issue in this case occurred well before the *Armco* decision. There is no attempt by the Commissioner here to collect "unconstitutional" taxes since the statute was presumably valid at the time the tax in issue here accrued.

B. THE GOVERNING STANDARD FOR QUESTIONS OF PROSPECTIVITY IS THAT ENUNCIATED IN *CHEVRON OIL CO. V. HUSON*.

The Taxpayer's attack on the decision below maintains that the West Virginia Court employed the wrong analysis as to civil prospectivity. This Court has explicitly stated that all questions of civil retroactivity are governed by *Chevron*. The Taxpayer asserts, on the other hand, that the correct rule is the common law rule articulated by Chief Justice Marshall in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). That is, that newly announced rules of law should be applied to both civil and criminal cases pending on direct review. Ashland took a contrary position below. Before the West Virginia Court, the Taxpayer cited the *Chevron* standards as the proper test in determining whether retroactivity was appropriate. *Brief of Appellee, Ashland Oil v. Rose*, 350 S.E.2d 531 (W. Va. 1986). *The Schooner Peggy* was not cited.

Ashland concedes, however, that the rule in *The Schooner Peggy* is modified by *Chevron* when an issue of retroactivity is present. J.S. at 10. Clearly, the issue to be addressed was seen by the West Virginia Court as the proper application of a constitutional

dispute that the *Chevron* standards guide such application in the civil context. *See United States v. Johnson*, 437 U.S. 537 (1982), *Griffith v. Kentucky*, 107 S. Ct. 708 (1987). Ashland's position that this case is controlled by *The Schooner Peggy* is clearly erroneous, since the *Chevron* criteria are satisfied by the circumstances herein, as the lower court properly found.

II. THE *CHEVRON* TESTS FOR PROSPECTIVE APPLICATION ARE SATISFIED HERE.

In *Armco*, the statutory scheme employed by West Virginia was declared facially discriminatory in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. The Tax Commissioner respectfully submits that the rules of law announced in the *Armco* decision were correctly applied on a prospective basis from June 12, 1984, and that this appeal should be dismissed.

The Federal Constitution has no voice on the subject of prospective or retroactive application, *United States v. Johnson*, 457 U.S. 537, 542 (1982), *Solem v. Sturms*, 465 U.S. 638 (1984), but the decisions of this Court have established that it is proper for decisions to be applied in a purely prospective manner, *See Great Northern Railway v. Sunburst Oil and Refining Co., supra*, and have defined criteria to determine whether or not a civil decision should be applied prospectively. Appellee submits that the *Armco* decision clearly fulfills each and every one of the *Chevron* criteria for prospective application.

As established in the first section of this motion, the recognized standards governing prospective application of judicial decisions in civil cases were set forth in *Chevron*. This Court recognized the standards as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, * * * 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. [Citations omitted].

404 U.S. at 106-107.

Under this three-step test, the *Armco* decision clearly should be prospectively applied.

The first stage of the three-prong *Chevron* test, is a threshold standard which questions whether the decision to be applied establishes a new principle of law. *Armco* certainly did so. This Court was presented with the issue of whether West Virginia's wholesale gross receipts tax was unconstitutionally discriminatory in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). The tax was expressly sustained by the dismissal of the appeal for lack of a substantial federal question. This amounts to a ruling on the

merits. *See Hicks v. Miranda*, 422 U.S. 332 (1975).

The Court in *Armco* overruled the clear past precident of *Columbia Gas*, explaining in footnote 7:

> We acknowledge our recent dismissal for want of a substantial federal question of a case raising, *inter alia*, a nearly identical challenge to the West Virginia gross receipts tax. *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). We may find it necessary not to follow such a precedent when the issue is given plenary consideration. *See, e.g., Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

Armco Inc. v. Hardesty, 467 U.S. 638 n.7.[1]

In addition to overruling a decision less than two years old, *Armco* established two "new rules" which make it a decision of national significance in the area of state taxation. First, citing *Maryland v. Louisiana*, 451 U.S. 725 (1981), this Court found that the gross privilege tax on manufacturing at the rate of .88% was not a compensatory tax, that is, one imposed to offset the exemption of intrastate wholesaler/manufacturers from payment of the lower .27% gross tax rate on the privilege of making wholesale sales in West Virginia of products which they manufacture in

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[1] Appellee agrees with Ashland that the Court was not presented with an issue of first impression in *Armco*. To the contrary, the issues therein had long been resolved by the decisions of this court which, because of the application of the new rules announced therein have been explicitly or implicitly overruled. *See Tyler Pipe, supra*, at 2824 (Justice Scalia, dissenting.)

West Virginia and sell there at wholesale. Second, the principle of "internal consistency," previously a net income apportionment test applied in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), was employed as a discrimination test for the first time.

These two "new rules" first announced in *Armco*, represented a sharp break from prior law. The *Armco* opinion significantly restricted the doctrine of compensatory taxes with regard to the scope of examination of a state's tax treatment of goods and materials to be consumed within a state. The disapproval of *Caskey Baking Co. v. Virginia*, 313 U.S. 177 (1941), in footnote 7 of *Armco*, signalled a restriction of the analysis employed determining whether a tax is compensatory in nature from a comprehensive examination of a state's entire scheme of taxation to a much narrower review of a state's taxation of "substantially equivalent events." Under this review, a taxpayer's wholesale sales of manufactured products and its manufacturing of such products are not "substantially equivalent events." Therefore, the Court held that the .88% rate on manufacturing was not compensatory for the lower .27% levy on the wholesale sales. This new rule was upheld in *Tyler Pipe, supra*.

Likewise, there was no prior indication that the "internal consistency" requirement, under which one must hypothesize that another state has adopted a tax identical to the tax in question, which was previously applied only to apportionment formulas used in net income taxes, would be grafted onto the discrimination test and applied to privilege taxes measured by gross receipts. In view of these two "new

rules" and the Court's reversal of *Columbia Gas Transmission Co. v. Rose, supra*, the *Chevron* threshold test is satisfied.

That these are "new rules" is vividly demonstrated by the flurry of scholarly commentary resulting from the decision. *See, e.g.*, Lathrop, *Armco - A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, 63 Taxes 551 (August 1985); Judson and Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes*, 87 W. Va. L. Rev. 723 (1985); Lightburn & McAuthur, *U.S. Supreme Court Ignores Unitary Issue in Armco, Inc. Opting for Discriminatory Finding*, 3 J. of State Taxation 211 (1984); Note, *A Call for Internal Consistency Among State Taxing Schemes: Armco, Inc. v. Hardesty*, 38 Tax Lawyer 519 (1985).

These articles have focused on the two "new rules" announced in the *Armco* opinion as well as the unitary concept issue which this Court did not reach in *Armco*. Special emphasis is placed on the impact of the "internal consistency" rule. These commentators predict, as did the lower court, that *Armco* signalled a return to the semantics-oriented, formalistic approach rejected by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *See Judson and Duffy, supra*, at 741. Although the Commissioner is not seeking its reconsideration here, it is clear that the holding in *Armco*, was not foreshadowed, and the "substantially equivalent event" and "internal consistency" tests as modified by *Armco* should be recognized as "new rules."

Ashland attacks the sufficiency of these "new rules," arguing that there was no clear break with

clear past precedent. Such arguments have a hollow ring. The Taxpayer's position relies principally on *Columbia Steel Co. v. Washington*, 30 Wash. 2d 658, 1982 P.2d 976 (1948), and on the dissenting opinion in *General Motors v. Washington*, 377 U.S. 439 (1964).[2] These holdings can hardly be considered clear foreshadowing of the impact of *Armco*. Ashland feigns astonishment at the lower court's reliance on *Columbia Gas*, ignoring the fact that at the time of that decision there had been no successful challenge to West Virginia's tax scheme for 49 years. Certainly West Virginia could reasonably rely on this dismissal on the merits and, just as certainly, such a dismissal is entitled to the same respect by state courts as is a decision following this Court's plenary consideration. *Hicks v. Miranda*, at 344.

Taxpayer's reliance on *Columbia Steel, supra*, is thoroughly misplaced. *Columbia Steel* did involve an exemption in the State of Washington's privilege tax system which was virtually identical to the exemption in *Armco*, and that exemption was found to discriminate against interstate commerce. However, the Washington Supreme Court in that case did not attempt to analyze the issue in terms of the actual effect of the exemption or consider the exemption in conjunction with that State's other tax provisions. The Washington Court clearly invalidated the tax on purely semantic grounds without consideration of the practical economic realities involved and later rec-

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[2] The Ashland contends that the dissent in *General Motors* was "fair warning" of the ruling in *Armco* ignores the fact that the State is bound to rely on the majority opinion in that case. The overturning of that opinion by this Court in *Tyler Pipe* serves to further highlight that *Armco* was not foreshadowed.

ognized as much in *B. F. Goodrich v. State*, 38 Wash. 2d 663, 231 P.2d 325 (1951).

Ashland also maintains that use of internal consistency as a discrimination test is nothing but a new label on existing law.[3] This contention is based on certain language in *Gwen White & Price v. Henneford*, 305 U.S. 434 (1989).

The issue in that case was whether Washington's "business activities" tax created an unconstitutional burden on interstate commerce. The Court held that it did. The opinion, like *Columbia Steel, supra*, is based on the formalistic, semantics-oriented approach. Compare *Standard Pressed Steel v. Department of Revenue of Washington*, 419 U.S. 560 (1975).

Prior to *Armco*, the question of whether a state taxing scheme was discriminatory in nature turned on the ability of the taxpayer to demonstrate actual "dollars and cents" discrimination. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). That is, the tax was to have been examined for its practical effect, *Maryland v. Louisiana*, 451 U.S. 725 (1981). The internal consistency rule requires no such showing. The language relied on by Ashland from *Gwen White & Price* was in no manner the rule in effect at the time of *Armco*.

One need look no further than the dissent in *Armco* to find a rebuttal to Ashland's contention.

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[3] The significance of the internal consistency rule as a discrimination test was firmly established in *Tyler Pipe, supra*. Justice Scalia, in the dissenting opinion, found the application of the internal consistency rule to be revolutionary to the law of state taxation. 107 S. Ct. 2825 (1987) *Scalia, J. diss.*

The Court also justifies its decision on the ground that if Ohio, or any state where appellant may manufacture products sold in West Virginia, imposed a manufacturing tax, appellant might possibly pay more taxes on its goods sold in West Virginia than a local manufacturer. But, appellant has not demonstrated that it in fact pays a higher tax burden in West Virginia solely by reason of interstate commerce. The Court sidesteps that fact, however, by borrowing a concept employed in our net income tax cases. Under that line of cases, a state tax must have an internal consistency that takes into consideration the impact on interstate commerce if other jurisdictions employed the same tax. *See Container Corp. of America v. Franchises Tax Board*, 463 U.S. 159 (1983). It is perfectly proper to examine a state's net income tax system for hypothetical burdens on interstate commerce. Nevertheless, that form of analysis is irrelevant to examining the validity of a gross receipts tax system based on manufacturing or wholesale transactions. Where a state's taxes are linked exactly to the activities taxed, it should be unnecessary to examine a hypothetical taxing scheme to see if interstate commerce would be unduly burdened. [Citations omitted].

467 U.S. at ___ , 105 S. Ct. at 2626 (Rehnquist, diss.)

Subsequent to *Armco*, it is no longer necessary for a taxpayer to show actual discrimination to maintain a successful Commerce Clause claim, as previously required. The "actual dollars and cents" standard of

Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963) was abandoned. Clearly, therefore, the threshold *Chevron* test has been satisfied.

The second prong of the *Chevron* test requires inquiry into the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will retard this operation." Retrospective application of *Armco, supra*, will not further the purpose or operation of the Commerce Clause, which is to create an area of free trade among the several states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 327 (1977); *American Trucking Association, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987). There is no likelihood that refunding taxes collected, or, as is the case here, annulling an assessment for fiscal years 1975 and 1976, would have any commerce clause impact "since whatever chill on interstate trade [created by the offending statute] is in the past." *National Can Corp., supra*, 749 P.2d at 1291 (1988). There is no indication in the record that there has been any hindrance of free trade whatsoever. Retroactive application of the "new rules" will simply not effectuate the Commerce Clause goals which the Court sought to achieve in *Armco* to any greater extent than would prospective application. To apply *Armco* retroactively rather than prospectively would serve only to deplete the State of West Virginia treasury and will not result in freer trade among the states.

Ashland, of course, takes the position that prospective application is detrimental to the operation of the Commerce Clause, and states that the purpose of the Commerce Clause is to prevent collection of unconstitutional taxes. The historical purpose of the Commerce Clause is, however, to prevent the imposition of trade barriers among the states, and to promote an interstate free-trade zone. This purpose is accomplished by constitutionally barring the states from regulating interstate commerce, and charging Congress with this duty and authority. Taxation of interstate commerce in violation of constitutional limitations is a form of regulation of interstate commerce by the states. Thus, the true "purpose and effect" of this provision is to promote free-trade among the states, not merely to bar tax collections.

Since, after *Armco* and *Tyler Pipe*, the very risk of multiple burdens are enough to invalidate the tax schemes in question, Ashland would not be required to show that it has suffered any actual multiple burden of taxation as to the activities in question. The discrimination alledged is purely theoretical. The abolition of the West Virginia wholesale tax on a prospective basis, which ends any risk of this theoretical discrimination, while avoiding the possibility of future discrimination, is, then, well-tailored to the commerce clause goals of *Armco*.

The final inquiry under *Chevron* is a balancing test, requiring comparison of the hardship or injustice created by a retroactive application against that of prospective application of the new rule of law.

Applying *Armco, supra*, retroactively will not serve the ends of justice and will impose substantial hardship on the State of West Virginia and her taxpayers. The West Virginia gross receipts tax is of long standing. This taxing scheme had been in operation since 1933, remaining substantially the same for fifty years prior to this Court's decision in *Armco*. The burden of retroactive application of *Armco* to West Virginia and her taxpayers would be brutally heavy, as it would

result in a revenue loss of approximately 50 Million Dollars. The State of West Virginia is constitutionally required to have a balanced budget and has relied upon the availability of these monies in planning future fiscal policy and formulating its budget allocations. Thus, actual fiscal hardships would result from retroactive application of the *Armco* rules without no substantial Commerce Clause benefit.

The payment of these refunds would have a much greater economic impact on the State of West Virginia than would the loss of a windfall refund to the individual manufacturer-wholesalers and their stockholders who stand to benefit from a retroactive application. Obviously, the State would suffer more harm than any single taxpayer could benefit.

It is important to note that, prior to the *Armco* decision, Ashland *did not* argue that the wholesale gross receipts tax was discriminatory. *Armco* was recognized by both parties as being significant to the outcome of this proceeding solely because of the important nexus questions at issue which this Court ultimately found unnecessary to address. The briefs filed before the Circuit Court of Kanawha County dealt exclusively with the nexus issues. Ashland raised no objection to the assessment based on discriminatory treatment prior to June 12, 1984, the day of the issuance of the *Armco* decision. As the West Virginia Court expressly recognized, "although Ashland asserts that it raised the Commerce Clause argument from the beginning, it is clear from the record that the real dispute in this case has been nexus." 350 S.E.2d at 537, J.S. 22a.

In the face of this massive depletion of the public treasury coupled with the reliance which the taxpayers and the State have placed on a fifty-year-old statute, the harm to the State of West Virginia, should *Armco* be applied retroactively, unquestionably outweighs any harm resulting from the loss of lessened tax burdens to Ashland and similarily situated taxpayers for past years.

This Court has consistently applied decisions prospectively in civil cases involving the public treasury of state and local governments.

In *Cipriano v. Houma*, 395 U.S. 701 (1969), a Louisiana law which provided that municipal bonds could be issued only if approved by a majority of "property taxpayers" was struck down because it was in violation of the equal protection clause of the Fourteenth Amendment. The decision in *Cipriano* was not applied retroactively, so it did not apply to bonds where authorization for issuance had been completed prior to the date of the decision.

In *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (hereinafter *"Lemon II"*), the question was whether to apply the decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter *"Lemon I"*), prospectively. *Lemon I* struck down, on First Amendment grounds, a Pennsylvania law which provided for reimbursement of nonpublic sectarian schools for certain educational services as violative of the First Amendment. At stake were 24 Million Dollars which the schools were to be paid prior to the decision in *Lemon I*. The decision was applied prospectively in *Lemon II* and the schools received payment:

> 'In short, the propriety of the relief afforded appellants by the District Court, ap-

> plying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, *absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.'*

[411 U.S. at 208-209]. (Emphasis supplied).

Here, as in *Lemon II*, to compel a state official, the Tax Commissioner, to anticipate a judicial ruling of which he had no inkling until *Armco*, *supra*, "elevates judicial fiat at the expense of basic principles of fairness and common sense." *See Ables v. Mooney*, 164 W. Va. 19 (1979) 264 S.E.2d 424, 432. Indeed, the major distinction between *Ables* and the instant case is the vastly greater amount of public funds at stake in the case at bar.

Likewise, a New Jersey case, *Salorio v. Glaser*, 461 A.2d 1100 (N.J. 1983), closely resembles this one. That case struck down New Jersey's emergency transportation tax because it violated the Privileges and Immunities Clause of the Constitution.

Relying on *Lemon II*, *supra*, the Court applied the decision prospectively, stating:

> The legislative and executive branches of government have relied on the ETT for many years in preparation of budgets, with respect to both income and expenditures, and in making appropriations and expenditures. The expenditures cannot be undone and reimbursements would have a substantial ef-

> fect on the State's existing financial requirement. Public fiscal stability is at issue.
>
> Furthermore, no one challenged the ETT until June 1977, fifteen years after the ETT was enacted. * * * It is of considerable moment that the plaintiffs have suffered no financial harm because they have received a credit of the amount paid to New Jersey against their New York income tax. Under these circumstances we believe that reimbursement is not warranted.

461 A.2d 1109-1110.

The aggrieved party subsequently sought review of the decision, but it was denied. *Salorio v. Glaser*, *supra*, *cert. denied* sub nom. *Glaser v. Salorio*, 464 U.S. 993 (1983).

The reasoning on which these courts relied is equally applicable to the case at bar. All these cases involve new rules or an unforeseen overruling decision in civil cases in which public treasuries of state and local governments are at risk. Where state officials, in good faith performance of their official duties, rely on presumptively valid statutes which are unexpectedly overturned, prospective application is appropriate under the *Chevron* criteria.

III. ASHLAND CANNOT ESCAPE TAXATION BY ATTEMPTING TO ISOLATE ITS WEST VIRGINIA SALES INTO COMPARTMENTS AND CONTENDING THAT EACH COMPARTMENT MUST BE VIEWED SEPARATELY WITHOUT REGARD TO ITS ADMITTEDLY PERVASIVE PRESENCE IN WEST VIRGINIA.

The second issue raised by Ashland in its Jurisdictional Statement is that the Circuit Court erred in

finding that Ashland's wholesale and retail sales in West Virginia, which are the subject of the assessment, have a sufficient nexus with the state to subject them to the business and occupation tax. Ashland relies almost entirely on *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951). In *Norton*, as noted by Ashland, this Court set out the requirement that once a firm or individual enters a state to do local business subjecting itself to that state's taxing power, it can avoid taxation only by showing that the particular transactions are "disassociated" from the local business and that such transactions are interstate in nature. Ashland's dependence on *Norton* is unconvincing and unpersuasive for two reasons. First, as noted in the Commissioner's Administrative Decision, "there is almost no similarity between the sales operations and activities of Ashland Oil, Inc. and the Norton Company." *See Administrative Decision*, J.S. at 39a. Secondly, Ashland cites the *Norton* test, while ignoring the modification of that rule by subsequent opinions of this Court. These items will be separately discussed.

Ashland's argument fails to recognize that the nexus requirement has been modified by this Court since 1951. Ashland cites *Norton* for the proposition that the State is required to view every *transaction* in isolation to determine whether it has been disassociated from the local business. In *General Motors v. Washington*, however, the *Norton* rule was modified, as the West Virginia Supreme Court recognized in its *Armco* decision, 303 S.E.2d 706 (W. Va. 1983). In *General Motors*, the issue involved the taxability of the sale of vehicles, parts and accessories ordered from out-of-state manufacturing facilities and shipped

directly to dealers. GM contended that four of its divisions had insufficient business connections with Washington for the tax to be constitutionally levied. This Court's consideration of GM's Washington business was not limited to the activities of the individual divisions. Rather, while acknowledging that the four divisions operated substantially independently of each other, this Court found the correct test to be consideration of GM's "bundle of corporate activity," ruling that GM was so enmeshed in local connections that, like Ashland, it voluntarily paid tax on some operations, but not on others. On the basis of the "bundle of corporate activity" test, all four divisions' sales were taxable. *Norton* was cited with approval in *General Motors* and it was recognized that "mere entry into a state did not take away from a corporation the right to do business with tax immunity," Id. at 439, but at the same time, the Court refused to allow GM to "channel its operations through a maze of local connections as does *General Motors* and take advantage of its domesticity and still maintain the same degree of immunity." *Id.* at 439. This is, of course, precisely what Ashland seeks to do in this case through compartmentalization of its activities. It was clearly held in *General Motors* that when a corporation so enmeshes itself in local connections that it voluntarily pays tax on various of its operations, but insists that it is not liable on others, a state may constitutionally levy a tax.

The second case arising in the State of Washington which modifies the *Norton* rule was *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975). There, the taxpayer, relying on *Norton*, argued that its sales to its only Washington cus-

tomer, Boeing, created a contact too tenuous for a taxable nexus. That argument was rejected because the taxpayer's activities, through its in-state employee "made possible the realization and continuance of valuable contractual relations." *Id.* at 562. The sales were held taxable, citing *General Motors*.

The latest case which refutes Ashland's compartmentalization theory is *D. H. Holmes Co, Ltd. v. McNamara*, 108 S. Ct. 1619 (1988). In that Louisiana dispute, the taxpayer claimed its mail distribution of catalogs printed out-of-state was not subject to use tax because of a lack of nexus. Holmes had extensive presence in the state, including thirteen retail stores and $100,000,000 in annual sales. The Court was unpersuaded, stating that the "argument ignores, however, Holmes' significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *Id.* at 1524. Holmes, said the Court, had "nexus aplenty."

If *Holmes* is contrasted with the *Norton* rule, the fatal flaw in Ashland's argument becomes apparent. When a corporation's intrastate activities are so extensive as Ashland's, the corporation cannot retain tax immunity even to individual operations it conducts which have some interstate characteristics, when such activities are so closely entertwined with its local presence that the other activities are indistinguishable.

The West Virginia Supreme Court, in its *Armco* decision, reviewed these and other precedents established by this Court, and determined that the principles of the unitary business concept were appropriate in reviewing nexus questions. This conclusion was

based to a great extent upon this Court's opinion in *General Motors*, which held that the *Norton* disassociation was not present when a corporation's other in-state presence provided it a domestic character which contributed to its interstate business, a form of the unitary concept.

In *Mobile Oil Corp. v. Vermont*, 445 U.S. 425 (1980) and then in *Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980), this Court addressed the principles of the unitary business concept and held that an activity must constitute a discrete business enterprise to meet the *Norton* disassociation test. *Exxon* established that the mere operation of a corporation on a divisional basis does not establish a disassociation between the divisions.

Ashland takes the position that *Norton* allows it to artificially compartmentalize its West Virginia operations, requiring the State to essentially wear blinders when considering these nexus issues. This is, of course, completely contrary to this Court's consistent rulings as to nexus. Ashland Oil, Inc. divides itself, ameobalike, from a single, integrated corporation into five companies (Ashland Petroleum Company, Ashland Chemical Company, Ashland Construction Company, Ashland Exploration Company, and Ashland Oil Canada) then it breaks the companies down into divisions, the divisions into "separately identifiable marketing operations" or SIMOs, and the SIMOs into compartments. The assessment in issue involves five divisions of Ashland Petroleum and four divisions of Ashland Chemical. These nine divisions were subdivided into seventeen SIMOs. The SIMOs were further

compartmentalized into 33 West Virginia factual situations. (Administrative Decision J.S. 31a-37a).

Ashland's extensive West Virginia sales operations bear little resemblance to relatively paltry activities at issue in *Norton*. There, a Massachusetts-based corporation, authorized to do business in Illinois, contested the constitutional range of that state's taxing power. *Norton* maintained a branch office and warehouse in Chicago, Illinois. In addition to direct, over-the-counter sales, the branch office took orders which were forwarded to the Massachusetts home office for acceptance, received mail-order shipments for distribution to local customers and serviced products for customers. The home office in Massachusetts received and filled other mail orders by direct shipment. It was held that not only were sales made directly by the Chicago office taxable, but that the sales facilitated through it were likewise subject to tax since it had not been shown that the involvement of the office and warehouse "were not decisive facts in establishing and holding the market." 340 U.S. at 538. The only sales shown to be disassociated from the local business were the mail orders placed with the Massachusetts home office and shipped directly to customers. In contrast to Ashland's West Virginia operations, the *Norton* taxpayer utilized no Illinois solicitors and maintained only one branch office, while Ashland maintains extensive West Virginia facilities including plants, storage facilities, transportation facilities, retail gasoline stations, oil and natural gas production facilities and other retail and wholesale marketing outlets. As recognized in the Administrative Decision "Ashland itself notes that it 'has a very pervasive influence in the State of West Virginia and

that nexus, for whatever purpose and under any sort of test imaginable undoubtedly exists'. (Petitioner's Reply Brief p. 2.)" J.S. at 40a. Even consideration of only the two Ashland companies which made the sales in question, the petroleum company and the chemical company, reveals extensive in-state operations, including plants, storage and loading facilities, retail outlets as well as in-state solicitation. Clearly, Ashland's West Virginia operations cannot be compared to the single-branch office at issue in *Norton* because of Ashland's persuasive presence in West Virginia. *D.H. Holmes, supra*. The record also reveals that "Ashland utilizes local advertising, solicitation of orders, delivery by company-owned vehicles, technical advisors and marketing assistance, inventories and offices in this state to promote its sales." Administrative Decision, J.S. 40a.

It must be kept in mind that Ashland has entered West Virginia and concedes and paid tax on a substantial amount of income attributable to its West Virginia operations. Ashland has attempted to artificially isolate its extensive operations into companies, then divisions, SIMOs and finally compartments in attempting to avoid nexus and taxation. Even consideration of each of the two companies at issue, when viewed apart from all of Ashland's West Virginia activities does not support its argument. Both the chemical company and the petroleum company had far more West Virginia activity than did the four divisions in *General Motors*.

Ashland contends that the Circuit Court's decision with regard to nexus should be reversed because it relies upon the West Virginia Supreme Court's decision in *Armco*. Ashland argues that the use of the

is directly in conflict with *Norton*. As previously stated, however, this argument ignores the consideration of the entire bundle of corporate activity required by *General Motors*. Ashland would have this Court view *Norton* in the same way it would have the Court view Ashland's West Virginia business activities: in isolation without reference to subsequent cases of this Court which more closely resembles the actual factual situation.

CONCLUSION

For the reasons given above, this appeal should be dismissed, or in the alternative, the Judgment should be affirmed.

Dated this 4th Day of November, 1988.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 88-421

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASHLAND OIL, INC.,
Appellant,
v.
HERSCHEL H. ROSE, III,
STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee.

On Appeal from the Circuit Court of Kanawha County, West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee was requested and refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers

of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 285 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as the instant case in which West Virginia has given prospective effect only, except as to Armco, to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating the state's wholesale gross receipts tax as unconstitutionally discriminatory under the Commerce Clause. Thus, the West Virginia Supreme Court has held that the State can (1) retain all discriminatory taxes assessed and collected prior to June 12, 1984 and (2) continue to assess and collect unconstitutional taxes for tax periods on/before June 12, 1984. A substantial number of COST members are among those taxpayers which are adversely affected by the prospective ruling of the court below since the right to recovery of these illegally-exacted taxes pursuant to the refund statute provided by the state legislature is effectively extinguished. If permitted to stand, the finding of unconstitutional state taxation by this Court in *Armco* would thus become meaningless as to these many taxpayers.

The larger problem is the increasing number of jurisdictions which, during the past five years, have determined that judicial decisions invalidating unconstitutional state taxes should be applied prospectively. *See First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985); and *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), *appeal dismissed, cert. denied*, 108 S. Ct. 2030 (1988) (6-3 vote on June 6, 1988). Similar retroactivity issues are presented by petitioners before this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000 (Fla. 1988), *petition for cert. filed*, No. 88-192 (July 30, 1988), and *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d 377 (Ark. 1988), *petition for cert. filed*, No. 88-325 (Aug. 23, 1988).

The question presented by the petition in *American Trucking Ass'ns* is whether this Court's decision in *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), invalidating Pennsylvania's highway flat taxes as unconstitutionally discriminatory under the Commerce Clause, should be applied retrospectively. In this case, the Arkansas Supreme Court not only denied retroactive implementation of this Court's decision but applied *Scheiner* prospectively from August 14, 1987, the date Justice Blackmun ordered the contested taxes be placed in escrow. 108 S. Ct. 2 (1987). Other States are seeking to apply the prospectivity doctrine to avoid refunds of similar flat taxes found unconstitutional under this Court's *Scheiner* decision, including Pennsylvania, New Jersey and Vermont. In a particularly disturbing action, the Maryland Circuit Court attempted to delay implementation of *Scheiner* until July 1 1988. *American Trucking Ass'ns, Inc. v. Goldste* No. 87182090/CE67934 (Md. Cir. Ct. Oct 23, 1987), *rev'd*, 541 A.2d 955 (Md. 1988). The split of authority and the importance of this "prospective only" problem was highlighted by the New Jersey Tax Court in its opinion issued on September 8, 1988 in *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT, ordering refunds of unconstitutional truck decal taxes so that "legislators will be dissuaded from enacting legislation which discriminates against interstate commerce."

Until recently, the States and taxpayers alike have generally recognized the taxpayer's right to a refund or

abatement of unconstitutionally-exacted taxes. There is a disturbing, emerging trend by some States to apply a judicial decision of unconstitutional or illegal state taxation only on a prospective basis, thereby allowing them to retain the financial benefit of the revenues collected under the unconstitutional law, *see also Penn Mutual Life Ins. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); and *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E. 2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E. 2d 1388 (Ohio 1987). However, it has long been established that "[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitutional as was the collection of tax in the first instance. *See, Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L.Ed. 478 (1930)." *United States v. State Tax Commission of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981). The purpose and effect of the rule of prospectivity adopted by the West Virginia Supreme Court is to deny the Appellant Ashland and all other taxpayers the remedy to which they are constitutionally entitled. This wave of unconstitutional "prospective only" holdings is affecting our member companies in many parts of this Nation.

By this motion, COST seeks leave to show that this Court's decision in *Armco, Inc. v. Hardesty*, holding the West Virginia wholesale gross receipts tax to be unconstitutional, should apply retrospectively to prevent inequity and protect the constitutional rights of interstate corporate taxpayers; and, in the alternative, that application of the "unitary business principle" is constitutionally insufficient to validate imposition of the West Virginia wholesale gross receipts tax to wholly interstate sales where such transactions are unrelated to a taxpayer's business activities in the State.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectively so moves the Court.

Dated: November 4, 1988

Respectfully submitted,

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On Appeal from the Circuit Court of Kanawha County, West Virginia

---

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of Appellant's Jurisdictional Statement in the above-captioned case.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

An increasing number of States have given prospective effect only to this Court's decisions of unconstitutional state taxation to avoid refunds and to allow continuing collection of such taxes after they have been invalidated. This Court, in declaring a state tax unconstitutional, has declined consideration of whether its ruling should be applied retroactively and has left resolution of this issue to state courts in the first instance. Predictably, this issue has almost always been resolved in favor of the State. Left to their own discretion, state courts have applied their own standards in their prospective rulings. The three-pronged test established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as governing consideration of whether to impose a decision prospectively only has not been followed. A balancing of equities in determining the taxpayers' remedy for the imposition of an unconstitutional tax has been ignored. Taxpayers' rights to recovery of these unconstitutionally-exacted taxes pursuant to refund statutes provided by state legislatures are thereby extinguished. States are allowed to retain the financial benefits of the revenues collected under unconstitutional laws. Clarification by this Court is needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of nonretroactive application of judicial decisions invalidating state taxes as unconstiutional under the United States Constitution.

Even if the decision of the court below giving prospective effect to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), does not preclude collection of the invalidated tax, the West Virginia wholesale gross receipts tax may not be constitutionally applied to the sales at issue in the instant case because substantial nexus did not exist between West Virginia and those sales. A state's application of the "unitary business principle" to validate imposition of a gross receipts tax on

the gross proceeds of interstate sales absent significant local activities related to such transactions irreconcilably conflicts with this Court's decision in *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951), and is impermissible under the due process and commerce clauses of the United States Constitution.

Guidance by this Court is needed to assure a consistent and fair system of taxation throughout the nation which will (1) allow each State to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the constitutional rights of interstate corporate taxpayers.

ARGUMENT

I. THIS COURT'S DECISION IN *ARMCO, INC. V. HARDESTY*, HOLDING THE WEST VIRGINIA WHOLESALE GROSS RECEIPTS TAX TO BE UNCONSTITUTIONAL, SHOULD NOT BE GIVEN "PROSPECTIVE ONLY" EFFECT

The rule of limited retrospectivity—that a change in law must, at a minimum, be given effect while a case is pending on direct review was established in *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). While this principle was applied in *Schooner Peggy* where the intervening change in law involved a treaty, this same approach has been applied in cases where a change in law is made by statute, *Bradley v. School Board*, 416 U.S. 602 (1960); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940); by constitutional amendment, *United States v. Chambers*, 291 U.S. 217 (1934); by judicial decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moores v. National Bank*, 104 U.S. 625 (1882); and where the change in law is "constitutional,

statutory or judicial", *Thorpe v. Housing Authority*, 393 U.S. 268, 282 (1969).

The rule of *Schooner Peggy* was noted as being applicable in both civil and criminal litigation in *Linkletter v. Walker*, 381 U.S. 618 (1965) when this Court adopted the first of its modern retroactivity tests for cases involving application of new constitutional rules. The three-pronged test established therein applied to criminal litigation and required a "weigh[ing] of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

A separate standard for governing questions of retroactive application of new rules of law in civil cases was enunciated in *Chevron Oil v. Huson*, 404 U.S. 97 (1971). Three factors were established as relevant in determining whether a decision should have nonretrospective effect:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation. . . . Finally, we have weighed the inequity imposed by retroactive application for where a decision of this court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." (Citations omitted). 404 U.S. at 106-107.

Application of the retrospective standards of *Linkletter* generated incompatible rules and inconsistent principles and thus in *Griffith v. Kentucky*, 107 S. Ct. (1987), this Court adopted Justice Harlan's approach to retroactivity

propounded in *Desist v. United States*, 394 U.S. 244, 256 (1969) (dissenting opinion) and in *Mackey v. United States*, 401 U.S. 667, 675 (1971). The Court held in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S. Ct. at 716. Thus, the Court has abandoned its efforts, at least in the area of criminal litigation, to deviate from the established principle under the *Schooner Peggy* line of cases that new rules of law should be applied retroactively to non-final cases.

While it was noted in *Griffith* that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*", 107 S. Ct. at 713 n.8, the rationale for eliminating deviating retrospective rules applies equally here. This Court rejected any exception for a new rule which is a clear break with the past for the same reasons that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional adjudication:

> "First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies'. *See* U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review."
>
> • • • •
>
> "Second, selective application of new rules violates the principle of treating similarly situated defendants the same." 107 S. Ct. at 713.

Indeed, Justice Harlan cautioned the Court in *United States v. Estate of Donnelly*, 397 U.S. 286 (1970), that certain distinctions suggested in civil cases, such as between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes, may lead the Court to a "retroactivity quagmire" similar to that which it has just escaped in the criminal field. 397 U.S. at 295. In Justice Harlan's view, new rules of law should be applied retrospectively also in non-final civil cases, there being no justification for applying principles, constitutional or otherwise, determined to be wrong to litigants who are or may still come to court. Consistent with his approach to criminal retroactivity adopted by this Court in *Griffith*, "the underlying substantive principle [is] that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." 286 U.S. at 297. It is again that time called for by Justice Harlan when " 'Retroactivity' must be rethought." 107 S. Ct. at 712.

The question of the retroactive effect of judicial decisions of unconstitutional state taxation, such as that presented in the instant case, is a significant and recurring issue, affecting hundreds of interstate taxpayers. *See National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), *appeal dismissed, cert. denied*, 108 S. Ct. 2030 (1988)[1]; *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810, 2822-2823 (1987); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987); *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *reh'g denied*, 469 U.S. 912 (1984); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983). Similar retroactivity

[1] Justices White, Stevens and Scalia would have noted probable jurisdiction and set the case for oral argument.

issues are presented by the petitions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000 (Fla. 1988), *petition for cert. filed*, No. 88-192 (July 30, 1988), and *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d 377 (Ark. 1988), *petition for cert. filed*, No. 88-325 (Aug. 23, 1988).

It is clear that an increasing number of States are relying on the prospectivity doctrine to avoid refunds of unconstitutional or illegal taxes. *See also Penn Mutual Life Ins. Co. v. Dep't of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E. 2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Ins. Co. v. Comissioner*, 373 N.W. 2d 399 (N.D. 1985). *But see Burlington Northern Railroad Co. v. Board of Supervisors*, 418 N.W. 2d 72 (Iowa 1988); (prospective effect not given federal circuit court holding that Iowa's statutory scheme for taxing personal property of a railroad contravened a federal statute); *American Trucking Ass'ns, Inc. v. Conway*, No. S-14786WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed* No. 88-156 (Vt. Sup. Ct.) (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since the issue had been resolved in state court in 1983 and thus the taxpayers are entitled to the refund of escrowed tax payments); *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (taxpayers entitled to refunds of truck decal taxes since no justification existed for enactment in 1984 of obviously discriminatory taxes). This Court's reluctance to decide whether the prospectivity doctrine may be invoked by a State to extinguish a taxpayer's right to a refund of unconstitutional state taxes has produced myriad problems.

A purely prospective only ruling applies to all taxpayers, including the successful litigants, regardless of whether refund claims and assessments are pending or on appeal before any administrative body or court. However, state courts have also applied decisions of unconstitutional or illegal taxation retroactively to only the successful taxpayer litigants, *see Ashland Oil, Inc. v. Rose, supra*; *OAMCO v. Lindley, supra*; to only those taxpayers who are parties to pending litigation, *see Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); or to only those taxpayers who have actions pending before any administrative body or court in the State; *see Kansas City Millwright Co., Inc. v. Kalb*, 564 P.2d 1281 (Kan. 1977); and applied the decision prospectively as to all other taxpayers.

State courts have generally applied their prospective holdings of unconstitutional state taxation effective from the date of judgment even though the taxes were invalidated under a prior decision of this Court. *But see First of McAlester Corp. v. Oklahoma Tax Commission, supra* (decision invalidating state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983) effective from January 24, 1983, the date of this Court's decision). Thus, the State can retain all unconstitutional taxes assessed or collected prior to this Court's decision and continue to assess and collect the unconstitutional taxes subsequent to this Court's decision until issuance of its own prospective decision. In effect, the State is not only applying the Court's decision prospectively but postponing prospectivity until a later date unless an intervening event occurs prior to the issuance of a final state court judgment, such as the establishment of a court-ordered escrow account, *see American Trucking Ass'ns, Inc. v. Smith, supra* (prospective effect given *Scheiner* in ruling unconstitutional Arkansas Highway Use Equalization Tax not from date of decision but from August 14, 1987 when Justice Blackmun ordered future tax collections escrowed); or a legislative change eliminating the infirmity of the challenged tax, *see Metropolitan Life Ins. Co. v. Commissioner, supra* (while prospective effect given decision of unconstitutional state gross premiums taxes under *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), legislature eliminated the discriminatory nature of challenged tax in 1983). State courts have even permitted continued collection of the invalid and unconstitutional tax for a period of time after the prospective decision where the decision is to become effective at some future date. *See Salorio v. Glaser, supra* (prospective effective date of holding Emergency Transportation Taxes unconstitutional delayed to allow the taxing authorities to collect the tax until January 1, 1984, almost six months later). *But see American Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955 (Md. 1988) (trial court erred in postponing effective date of its holding that Maryland decal fee was unconstitutional under *Scheiner* to July 1, 1988 to allow state collection through current fiscal year).

This Court's decisions of unconstitutional state taxation in *Tyler Pipe* and *Armco* have been given immediate prospective effect by the respective courts below, *National Can Corp. v. Washington Dep't of Revenue, supra*; *Ashland Oil, Inc. v. Rose, supra*; however, an issue raised by the appeal in the instant case is whether Ashland is even seeking retroactive application of the *Armco* decision. Questions as to what is the operative event in determining whether a prospective or retroactive remedy for unconstitutional state taxation is being sought have also arisen recently in other cases where the state tax administrator has sought retention or collection of the unconstitutional taxes after this Court's decision. *See Midland Bank & Trust Co. v. Olsen*, 717 S.W. 2d 580 (Tenn. 1986) (refunds of taxpayers' 1982 corporate excise taxes mandated by *Memphis Bank* did not involve retroactive application of that decision since the taxpayers' cause of action did not accrue until the 1982 taxes

were due and paid under protest which occurred after the decision was rendered); *American Trucking Ass'ns, Inc. v. Goldstein*, *supra* (retrospectivity not at issue since the tax obligation did not occur until approximately January 1, 1988, more than six months after the date of this Court's *Scheiner* decision). In the instant appeal, the taxpayer contends that at the time of the *Armco* decision it had no pre-existing liability to pay the tax and collection could not have been enforced since its administrative and judicial remedies had not yet been exhausted and thus the tax commissioner is precluded from assessing and collecting the unconstitutional tax after this Court's decision in *Armco*.

The three-pronged test established by this Court in *Chevron* governs determinations in civil cases of whether a decision should be applied prospectively. *See Tyler Pipe Indus., Inc. v. Washington Department of Revenue*, 107 S. Ct. at 2822-2823 (1987); *Griffith v. Kentucky*, 107 S. Ct. at 713 n.8 (1987). *See also American Trucking Ass'ns, Inc. v. Smith*, *supra*; *National Can Corp. v. Washington Dep't of Revenue*, *supra*; *First of McAlester Corp. v. Oklahoma Tax Commission*, *supra*. Nevertheless, many state courts have applied their own criteria for prospective application of a decision holding a state tax unconstitutional, *see Ashland Oil, Inc. v. Rose*, *supra* (West Virginia Supreme Court applied state standards in ruling this Court's *Armco* decision should be given prospective effect only), and typically rest their prospectivity holdings on "equitable considerations" of the state's reliance on the overturned taxing statute for revenue and the great financial hardship on the State if retroactive effect were allowed, *see Penn Mutual Life Ins. Co. of Dep't of Licensing and Regulation*, *supra*; *Metropolitan Life Ins. Co. v. Commissioner*, *supra*; *Salorio v. Glaser*, *supra*; or that the taxpayers, if given a refund, would "in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." *Division of Alcoholic Beverages and Tobacco v. McKesson*

Corp., 524 So.2d at 1010 (Fla. 1988). *See also Metropolitan Life Ins. Co. v. Commissioner*, *supra* (pass-on defense insufficient alone to deny a refund of unconstitutional taxes but may be considered in weighing the equities in a prospectivity determination). *But see American Trucking Ass'ns, Inc. v. Conway*, No. S-147-86WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed* No. 88-156 (Vt. Sup. Ct.) ("Equity supports giving that windfall, if it exists, to the wronged plaintiffs.").

Furthermore, the three-pronged *Chevron* test has been given varying interpretations by the States as to the proper weight to be given each factor and as to the correct analysis required in applying the test to determine whether a decision of unconstitutional state taxation has declared a "new principle of law." The first *Chevron* factor requires that if a decision is to be applied prospectively only, it must have established a new principle of law by either overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreshadowed. This Court has stated that in civil cases this "'clear break' principle has usually been . . . the threshold test for determining whether or not a decision should be applied nonretroactively." *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). Some States have applied the "clear break" principle as the threshold requirement in their prospectivity determinations, *see National Can Corp. v. Washington Dep't of Revenue*, *supra*; *First of McAlester Corp. v. Oklahoma Tax Commission*, *supra*; while others have given equal weight to all three *Chevron* factors, *see American Trucking Ass'ns, Inc. v. Smith*, *supra*.

State courts have also applied varying standards in determining whether a decision has established a "new principle of law" under the first *Chevron* criterion. In its ruling that this Court's decision in *Scheiner* should apply prospectively only, the Arkansas Supreme Court

found this aspect of the *Chevron* test was satisfied because *Scheiner* "declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), in which 'flat' highway taxes were held not violative of the Commerce Clause." *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d at 378-379. *Cf. Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d at 1010 (prospective application of holding of unconstitutional tax preference scheme under this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), justified because tax was collected by division in good faith reliance on presumptively valid statute).

The Washington Supreme Court finding in *National Can* that this Court's *Tyler Pipe* decision established a new principle of law overruling past precedent on which litigants may have relied was based on "[the Washington Supreme Court's] unanimous decisions in *National Can* and *Tyler Pipe*, the long line of [Washington Supreme Court] cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*," *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1288, even though the holding was "clearly foreshadowed" by the Department of Revenue at least by the time this Court issued its decision in *Armco* on June 12, 1984, *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at ——. *See also First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d at 1036 ("Although the new principle of law established in *Memphis Bank* might be characterized as merely a progression from former decisions, it was not foreseen by the Commission, nor by the Oklahoma Legislature.").

The West Virginia Supreme Court of Appeals in the instant case, applying standards similar to those in

Chevron, relied principally on this Court's dismissal of the appeal in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982), involving a similar wholesale gross receipts tax, for its conclusion that this Court's *Armco* decision "represented a reversal of prior precedent". *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d at 536).

A question raised by these cases is whether the standards applied by the state courts satisfy *Chevron*'s "new principle of law" or "clear break" with precedent requirement. It has long been clear that the Commerce Clause prohibits taxes which favor local business over interstate commerce. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 415 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984; *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987); and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987). Despite the clarity of this principle, attempts to circumvent it are limited only by the imagination and the energy of state tax collectors. If a judicial decision of unconstitutional state taxation involves large potential refunds for many taxpayers, it is probable that no refunds will be granted. State courts have applied varied prospectivity standards to allow the States to retain the revenues collected under an unconstitutional tax. The rationale of this Court in *Griffith* for eliminating deviating retrospective rules applies equally here. As one noted commentator has observed: "Since many state courts have applied their own standards to determine retroactivity of a decision holding a state tax unconstitutional, the issue would seem to cry out for clarification by the Court." [2]

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[2] Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 141 (1987) (footnote omitted).

II. NEXUS ESTABLISHED BY APPLICATION OF THE UNITARY BUSINESS PRINCIPLE IS INSUFFICIENT TO VALIDATE A GROSS RECEIPTS TAX ON INTERSTATE TRANSACTIONS UNDER THE COMMERCE AND DUE PROCESS CLAUSES

The Circuit Court of Kanawha County, relying on the decision of the West Virginia Supreme Court of Appeals in *Armco, Inc. v. Hardesty*, 303 S.E. 2d 706 (W.Va. 1983), held that sufficient nexus existed between Ashland and the State of West Virginia to allow the State to tax Ashland's gross receipts from interstate transactions wholly unrelated to Ashland's West Virginia business activities. The West Virginia Supreme Court of Appeals in *Armco* forged a new standard totally unwarranted for determining nexus to impose taxes measured by unapportioned gross receipts from interstate commerce by its holding "that where a unitary business, such as Armco, has a substantial nexus in this State through its qualifying to do business in this State, and engaging in operations such as coal mining and sales of metal products, we are not required to separate the activities of its various divisions doing business in this State and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant the imposition of a business and occupation tax." 303 S.E. at 2d at 714.[3] The circuit court similarly concluded in the instant case that nexus existed with respect to the transactions sought to be taxed because Ashland was a "unitary business" with substantial operations in West Virginia even though the parties stipulated that there was no connection between Ashland's West Virginia activities and those transactions which were entirely interstate, i.e., absent any related local activity upon which the tax could be based.

[3] This Court held that the West Virginia wholesale gross receipts tax unconstitutionally discriminated against interstate commerce and thus did not reach this nexus issue raised on appeal in the *Armco* case.

The decision below is in direct conflict with this Court's decision in *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951), establishing the nexus standard in gross receipts tax cases. *Norton* involved a Massachusetts manufacturer which operated a branch office and warehouse in Illinois from which it made local sales or distributed goods ordered directly from Massachusetts. In addition, Illinois customers sent orders directly to Massachusetts which were filled by direct shipment to the purchasers. Illinois sought to impose a tax upon all receipts from Norton's sales to Illinois residents regardless of whether those sales were associated or connected with the local office and warehouse which was conducting the intrastate business; however, this Court held that those sales which involved orders sent directly by the Illinois customer to Massachusetts and shipped directly from Massachusetts to the Illinois customer were "so clearly interstate in character" that the State could not reasonably attribute their proceeds to the local business" and thus they could not be subjected to the Illinois gross receipts tax. *Id.* at 539. The Court clearly enunciated the requiremet that in gross receipts tax cases nexus must exist with respect to the sales transactions being taxed:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation of some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature." *Id.* at 537.

In the instant case, the State has conceded that the sales made by Ashland are "dissociated" from Ashland's other business activities in West Virginia.

The West Virginia Courts are attempting to circumvent this constitutional nexus standard by interjecting into the area of unapportioned gross receipts taxes the "unitary business principle" which is only viable in the

area of apportioned net income taxation. The "unitary business principle", enunciated by this Court to be "the linchpin of apportionability", *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 439 (1980), is a relational concept essential to a determination of the portion of a taxpayer's net income earned from multistate business operations that is attributable by formulary apportionment to its activities in the taxing State. *See Container Corp. of America v. Franchise Tax Bd.* 463 U.S. 159 (1983); *F.W. Woolworth Co. v. Taxation and Revenue Dep't*, 458 U.S. 354 (1982); *ASARCO, Inc. v. Idaho State Tax Comm'n*, 459 U.S. 307 (1982); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); and *Mobil Oil Corp. v. Commissioner of Taxes, supra.* The underlying rationale of the unitary business/formula apportionment method is that

> "separate [geographical] accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. . . . Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source'". (Citation omitted). *Mobil*, 445 U.S. at 438.

The difficulties of geographical accounting or sourcing of any specific portion of the income earned by a multistate business enterprise thereby justifying resort to formulary apportionment is the sole reason for application of the unitary business principle. However, this reasoning fails in the context of an unapportioned gross receipts tax, such as in the instant case, where the West Virginia business and occupation tax, by its terms, applies to the gross proceeds of those engaged within the State in the business of making sales. Application of the "unitary business principle" in these circumstances is unwarranted and no justification exists for departure

from the *Norton* rule. A State may constitutionally tax the gross receipts of interstate transactions only if significant local activities related to such transactions exist in the taxing State.

CONCLUSION

For the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the questions discussed in Appellant's Jurisdictional Statement.

Dated: November 4, 1988

Respectfully submitted,

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REPLY

BRIEF

No. 88-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASHLAND OIL, INC.,

Appellant,

—v.—

HERSCHEL H. ROSE, III, West Virginia State Tax Commissioner and the West Virginia State Tax Department,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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November 14, 1988

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant, Ashland Oil, Inc. ("Ashland") submits this brief in opposition to Appellees' Motion to Dismiss or Affirm ("Appellees' Motion"). To the extent that Appellees' Motion raises questions that were not addressed in Ashland's Jurisdictional Statement ("Jurisdictional Statement") or that require clarification, those questions are discussed below in the order in which they are presented in Appellees' Motion.[1]

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1 Ashland states pursuant to Rule 28.1 that the Designation of Corporate Relationships filed as Appendix I to the Jurisdictional Statement is currently accurate.

THE QUESTIONS PRESENTED

In formulating the questions presented, Appellees have somehow lost track of a fundamental issue in this case. That is whether Ashland's success requires retroactive, or only prospective, application of the decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). Ashland's position is that only prospective application of *Armco* is required to preclude West Virginia from enforcing collection of the tax at issue, and that a decision in Ashland's favor is therefore required by the Supremacy Clause and the Commerce Clause. *See* Jurisdictional Statement at 8-14. Appellee's omission of any discussion of this fundamental question blurs the issues presented on this appeal and overstates the impact that a decision in Ashland's favor would have upon the West Virginia Treasury.

Appellees rely heavily upon cases involving "issues of remedies or refunds when a state tax is found unconstitutional . . . ." Appellees' Motion at 6. It must be reiterated that the present case does not involve issues of "remedies or refunds," and Appellees' reliance upon such cases is misleading. Ashland does not seek to remedy a prior wrong, but rather seeks to prevent a constitutional violation from occurring. *See* Jurisdictional Statement at 11 n.2, 12 n.3.

Appellees also assert that Ashland's success in this case would require the payment by West Virginia of tax refunds and that "[t]he payment of these refunds would have a . . . great . . . economic impact on the State." Appellees' Motion at 20. The simple fact of the matter is that Ashland does not seek herein to recover any money from the West Virginia Treasury, but merely seeks to preclude enforcement of an unconstitutional tax. Therefore, the present case involves considerations wholly separate from those present in refund cases. *See* Jurisdictional Statement at 20 n.5.

JURISDICTIONAL ARGUMENT

Appellees maintain that an appeal to this Court does not lie under 28 U.S.C. § 1257(2)(1982) "as to the prospectivity issue" because, with respect to that issue, "[t]he lower court did not uphold a state statute in the face of a constitutional challenge . . . ." Appellees' Motion at 3.[2] Appellees are apparently of the view that the constitutional validity of the West Virginia statute was not drawn in question within the meaning of 28 U.S.C. § 1257(2) because the decision of the Supreme Court of Appeals of West Virginia ("Court of Appeals") in this proceeding was based on retroactivity grounds. That argument misperceives the nature of both Ashland's claims and the conceptual underpinnings of the retroactivity doctrine.

This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a state "where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." 28 U.S.C. § 1257(2). Both of these requirements are satisfied here with respect to the issues raised in points I and II of the Jurisdictional Statement.

While Ashland was contesting the tax involved here on constitutional grounds in the West Virginia courts, this Court decided in *Armco* that the taxing statute violated the Commerce Clause. Subsequent to the *Armco* decision, West Virginia continued to press its claim against Ashland, asserting that because *Armco* should not be applied retroactively the taxing statute should be deemed not to violate the Commerce Clause. Ashland resisted this assertion in the courts below and in points I and II of the Jurisdictional Statement, its fundamental argument being that the Court of Appeals erred in holding that the taxing statute should be deemed not to violate the Constitution when

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2 Ashland assumes that Appellees' reference to the "prospectivity issue" is to those issues raised in points I and II of the Jurisdictional Statement at 8-14. Appellees do not contest the appellate jurisdiction of this Court under 28 U.S.C. § 1257(2) as to the nexus question decided by the Circuit Court of Kanawha County, West Virginia, and set forth in the Jurisdictional Statement at 21-25.

applied to the sales transactions at issue. It is difficult to imagine how one could more directly draw in question the constitutional validity of a state statute.

The second requirement of 28 U.S.C. § 1257(2)—that the appealed decision be in favor of validity of the state statute—has also been met here. The sole result of the decision of the Court of Appeals was to uphold the very State statute of which Ashland complained against Ashland's constitutional claim. Consequently, the conclusion that the decision of the Court of Appeals below upheld the validity of the State statute in question is unavoidable. As stated by this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 at 441 (1979):

> We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

Although the Court of Appeals acknowledged that the taxing statute at issue had been held unconstitutional in *Armco*, it nevertheless concluded that the tax imposed by the statute could be collected from Ashland. The Court of Appeals thus held the West Virginia taxing statute applicable to the particular set of facts presented herein, against Ashland's contention that the statute could not be applied because it violates the Commerce Clause. This Court accordingly has appellate jurisdiction over the issues set forth at points I and II of the Jurisdictional Statement.

Even if it were somehow concluded that either of the issues set forth in points I and II of the Jurisdictional Statement are not appealable under 28 U.S.C. § 1257(2), but rather are subject to certiorari jurisdiction under 28 U.S.C. § 1257(3)(1982), Ashland's inclusion of these issues in this appeal is nevertheless proper. As indicated above, this appeal also raises the question whether a sufficient nexus exists between West Virginia and the sales transactions at issue to allow West Virginia constitutionally to impose its gross receipts tax. *See* Jurisdictional Statement at 21-25. This nexus issue is clearly appealable under 28 U.S.C. § 1257(2), and Appellees do not argue to the contrary.

Where a case presents several federal questions, some of which are reviewable by appeal and others only by certiorari, the appellant may properly include in the questions raised on the appeal "any other denial of a federal right whether or not capable in itself of being brought [to this Court] by appeal." *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944). In such a case the nonappealable issues will be considered along with the appealable issues. *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 n.14 (1975); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922). Consequently, even if Appellees were correct that the issues raised in points I and II of the Jurisdictional Statement are not appealable, those issues are nevertheless properly presented on this appeal.[3]

NEXUS ARGUMENT

Appellees' argument that the sales transactions at issue had a sufficient nexus with West Virginia incorporates a fundamental factual error. Appellees state that: "When a corporation's intrastate activities are so extensive as Ashland's, the corporation cannot retain tax immunity even to individual operations it conducts which have some interstate characteristics, when such activities are so closely entertwined [sic] with its local presence that the other activities are indistinguishable." Appellees' Motion at 26.

The parties in this case stipulated that the sales transactions at issue were unrelated to any of Ashland's business activities in

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3 If for any reason this Court concludes that an appeal does not lie under 28 U.S.C. § 1257(2) with respect to any issues raised herein, Ashland respectfully requests that, with respect to those issues, the Jurisdictional Statement be treated, pursuant to 28 U.S.C. § 2103 (1982), as a petition for certiorari under 28 U.S.C. § 1257(3) to the extent necessary to preserve all issues raised in the Jurisdictional Statement, and that the petition be granted. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-63 n.4 (1980); *Addington v. Texas*, 441 U.S. 418, 422-23 (1979).

West Virginia. *See* Jurisdictional Statement at 6. As such, those sales transactions were not intertwined with Ashland's local presence in West Virginia, but were wholly dissociated from such presence. The sales involved herein therefore fall squarely within this Court's decision in *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951).

CONCLUSION

For the foregoing reasons, Appellees' Motion should be denied, and this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: November 14, 1988

Respectfully Submitted,

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SUPPLEMENTAL

BRIEF

(5)

No. 88-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASHLAND OIL, INC.,

Appellant,

—v.—

HERSCHEL H. ROSE, III, West Virginia State Tax Commissioner and the West Virginia State Tax Department,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant, Ashland Oil, Inc. ("Ashland"), filed its Brief in Opposition to Motion to Dismiss or Affirm on November 14, 1988. On that same day this Court granted petitions for certiorari in *American Trucking Ass'ns, Inc. v. Smith*, No. 88-325 (Nov. 14, 1988), *granting cert.* to 295 Ark. 43, 746 S.W.2d 377 (1988), *on remand from* 107 S. Ct. 3252 (1987), and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000 (Fla. 1988), *cert. granted*, No. 88-192 (Nov. 14, 1988). These cases call into question the circumstances under which state courts can properly use the doctrine of prospectivity to limit the consequences of a finding by this Court that a state tax is unconstitutional. This Supplemental Brief is filed, pursuant to Rule 16.6, to underscore the importance of the issues

raised in points I and II of Ashland's Jurisdictional Statement in fully resolving that question.[1]

DISCUSSION

On June 23, 1987, in *American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 2829 (1987), this Court declared that Pennsylvania's highway tax violated the Constitution. And three days later this Court vacated a judgment of the Supreme Court of Arkansas, which had upheld a virtually identical Arkansas highway tax, and remanded the case for further consideration in light of *Scheiner*. 107 S. Ct. 3252. Nevertheless, Arkansas continued to enforce its highway tax and exercised control over funds collected until August 14, 1987, when Justice Blackmun entered an order requiring that all further Arkansas highway tax collections be placed in escrow pending completion of the litigation. *American Trucking Ass'ns v. Gray*, 108 S. Ct. 2 (1987).

On March 14, 1988, the Arkansas Supreme Court, following *Scheiner*, struck down the Arkansas highway tax. 295 Ark. 43. The Arkansas Supreme Court also considered whether payors of the Arkansas highway tax were entitled to refunds of taxes paid (i) before this Court's decision in *Scheiner*; (ii) after this Court's decision in *Scheiner* and before Justice Blackmun's order of August 14, 1987; and (iii) after this Court's decision in *Scheiner* and paid into escrow pursuant to Justice Blackmun's order.

The Arkansas Supreme Court viewed these refund questions as turning on whether this Court's decision in *Scheiner* should be applied retroactively or prospectively only, and it held that prospective application of *Scheiner* was required. From this, the Arkansas Supreme Court concluded that only the tax paid into escrow pursuant to Justice Blackmun's order should be refunded. No refunds were warranted, the court concluded,

1 Ashland states, pursuant to Rule 28.1, that the Designation of Corporate Relationships filed as Appendix I to the Jurisdictional Statement is currently accurate.

with respect to taxes paid before *Scheiner* or after *Scheiner* and not paid into escrow.

In *McKesson*, the Florida Supreme Court determined that Florida's alcoholic beverage tax scheme violated the Constitution because it discriminated against interstate commerce, but it denied refunds to the litigant before it of any tax paid under the invalid tax scheme because, the Court said, its decision should be applied "prospectively".

In Ashland's case, the Supreme Court of Appeals of West Virginia ("Court of Appeals") has invoked a "prospectivity" doctrine to authorize the collection of a state tax previously declared unconstitutional by this Court in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), even though Ashland's liability for the tax, and West Virginia's entitlement to the tax, had not matured or become vested when *Armco* was decided.

The lesson emerging from these three cases is clear; the prospectivity doctrine, as applied by the state courts in the context of unconstitutional taxing statutes, covers a multitude of sins:

It has served as justification for the refusal of state courts to order refunds of taxes paid prior to the decision declaring the taxing statutes to violate the Constitution, even refunds to the taxpayer first litigating the constitutional issue (*McKesson*);

It has served as justification for refusing refunds of unconstitutional taxes, even though those taxes were collected after the decision invalidating the tax (*Smith*); and,

It has been invoked by the Court of Appeals in this case to justify the collection of a tax for which the taxpayer was not liable at the time the tax was declared by this Court to be unconstitutional.

This Court's consideration of the issues presented in *Smith* and *McKesson* will help define the limits of the state courts' use of the prospectivity doctrine in cases involving the refund of unconstitutional taxes. It will not, however, resolve the perhaps more compelling concern presented by this appeal, *i.e.*, the

legality under the circumstances involved here of the continuing enforcement of collection of a state tax previously declared unconstitutional by this Court. Accordingly, this case presents an opportune moment to introduce an element of consistency into the varied and at times opposing views of the state courts as to the utility of the prospectivity doctrine in limiting the consequences of decisions of this Court finding state taxes unconstitutional. Without this case, the opportunity to resolve completely this "retroactivity quagmire" (*United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring)) will be lost.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: November 17, 1988

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

ASHLAND OIL, INC. *v.* MICHAEL E. CARYL, TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. 88–421. Decided June 28, 1990

PER CURIAM.

Appellant Ashland Oil, Inc., a Kentucky corporation, is an integrated oil company that maintains business locations worldwide, including in West Virginia. During the years at issue here, West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale. W. Va. Code § 11–13–2c (1983). Local manufacturers were exempt from the tax. § 11–13–2. The West Virginia Tax Department conducted a detailed audit of Ashland's fiscal years ending September 1975 and 1976, and assessed a deficiency in tax payments of $181,313.22 for wholesale sales with West Virginia destinations. Ashland filed a timely petition for reassessment, primarily contending that the tax was unconstitutional as applied because there was an insufficient connection between its in-state activities and the transactions sought to be taxed. Juris. Statement 38a. After the State Tax Commissioner rejected Ashland's petition, Ashland appealed to the Circuit Court of Kanawha County. While the appeal was pending, this Court decided *Armco, Inc.* v. *Hardesty*, 467 U. S. 638 (1984), which invalidated the West Virginia tax scheme that had also been applied against Ashland as discriminatory against interstate commerce. The State Circuit Court granted Ashland summary judgment on the basis of our decision in *Armco*.

The West Virginia Supreme Court of Appeals reversed, holding that *Armco* did not apply retroactively, and remanded for further proceedings. Relying on its state-law criteria for retroactivity, see *Bradley* v. *Appalachian Power*

Co., 163 W. Va. 332, 256 S. E. 879 (1979), which it considered to "follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–[1]07 . . . (1971)," *Ashland Oil, Inc.* v. *Rose*, —— W. Va. ——, ——, n. 6, 350 S. E. 2d 531, 534, n. 6 (1986), the court determined that *Armco* "represented a reversal of prior precedent, and that retroactive application of the *Armco* rule would cause severe hardship." *Id.*, at ——, 350 S. E. 2d, at 536. Accordingly, the court held that the State was not precluded from collecting the gross receipts taxes due for the fiscal years preceding the date of decision in *Armco*. *Id.*, at ——, 350 S. E. 2d, at 536–537. We dismissed Ashland's appeal of this decision for want of a final judgment. *Ashland Oil, Inc.* v. *Rose*, 481 U. S. 1025 (1987). On remand, the Circuit Court rejected Ashland's remaining claim, and the State Supreme Court of Appeals denied Ashland's request for review.

In its appeal to this Court, Ashland contends, among other claims, that the State Supreme Court of Appeals erred in determining that *Armco* applied prospectively only. Because "[t]he determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law," *American Trucking Assns., Inc.* v. *Smith*, 495 U. S. ——, —— (1990), we must examine the state court's determination that *Armco* is not retroactive in light of our nonretroactivity doctrine.

Applying the view of retroactivity delineated by either the dissent or plurality in *American Trucking Assns.*, we must reverse the state court's decision. Under the reasoning of the dissent in *American Trucking Assns.*, *Armco* applies retroactively to the taxes assessed against Ashland because constitutional decisions apply retroactively to all cases on direct review. *American Trucking Assns., Inc.* v. *Smith*, *supra*, at —— (STEVENS, J., dissenting). Under the approach of the plurality in *American Trucking Assns.*, the same result obtains, because *Armco* fails to satisfy the first prong of the plurality's test for determining nonretroactivity. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), quoted in *American Trucking Assns., Inc.* v. *Smith*, *supra*, at —— (plurality opinion).

The first prong of the *Chevron Oil* test requires that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U. S., at 106–107 (citation omitted). In *Armco*, an Ohio corporation contested the applicability of West Virginia's wholesale tax on its in-state sales of steel and wire rope. In ruling that the tax violated the Commerce Clause, the Court relied on *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 332, n. 12 (1977), which held that a State "may not discriminate between transactions on the basis of some interstate element." On its face, West Virginia's statutory scheme had just such a discriminatory effect, as it "provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Armco*, *supra*, at 642.

The Court next considered the argument that the State's wholesale tax exemption did not discriminate against out-of-state taxpayers because it served as compensation for the imposition of a heavy manufacturing tax on in-state taxpayers. In *Maryland* v. *Louisiana*, 451 U. S. 725 (1981), we held that a tax on an out-of-state event may be considered a nondiscriminatory compensation for a tax on an in-state event when the State "is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State." *Id.*, at 759. Applying this test to the West Virginia tax scheme, the Court determined that "manufacturing and wholesaling

are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Armco*, 467 U. S., at 643. The Court distinguished *Alaska* v. *Arctic Maid*, 366 U. S. 199 (1961), and *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117 (1941), two cases that predated the compensatory tax doctrine enunciated in *Boston Stock Exchange* and *Maryland* v. *Louisiana*. *Armco*, *supra*, at 643, n. 7.

Finally, the Court rejected the argument that Armco should be required to prove the tax had actual discriminatory impact. Instead, the Court asserted that the "internal consistency" test, enunciated in *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 169 (1983), was applicable "where the allegation is that a tax on its face discriminates against interstate commerce." *Armco*, *supra*, at 644.

Armco unquestionably contributed to the development of our dormant Commerce Clause jurisprudence. See, *e. g.*, Judson & Duffy, An Opportunity Missed: *Armco, Inc.* v. *Hardesty*, A Retreat from Economic Reality in Analysis of State Taxes, 87 W. Va. L. Rev. 723, 740–743 (1985) (suggesting that *Armco*'s invalidation of a facially discriminatory tax statute signaled a retreat from the economically realistic approach adopted by *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and a return to a more formalistic analysis); Lathrop, *Armco*—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause, 63 Taxes 551, 558–559 (1985). In adopting the internal consistency test, *Armco* extended that doctrine beyond the context in which it had originated. See 467 U. S., at 648 (REHNQUIST, J., dissenting). Nevertheless, *Armco* neither overturned established precedent* nor decided "an issue

*The Court's dismissal for want of a substantial federal question of *Columbia Gas Transmission Corp.* v. *Rose*, 459 U. S. 807 (1982), a case raising a nearly identical challenge to the state tax, see 467 U. S., at 644, n. 7, a year prior to deciding *Armco*, does not amount to the "overruling [of] clear past precedent on which litigants may have relied." *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971). The Court gives less deference to summary dispositions, see, *e. g.*, *Caban* v. *Mohammed*, 441 U. S. 380, 390, n. 9 (1979), and it is unlikely that West Virginia relied upon the 1982 dismissal of *Columbia Gas*, given that the statute struck down in *Armco* had been in effect for more than 50 years.

of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, *supra*, at 106. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation," *id.*, at 257 (SCALIA, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary. See *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 303 (1987) (O'CONNOR, J., dissenting) ("At most, *Armco* may be read for the proposition that a tax that is facially discriminatory is unconstitutional if it is not 'internally consistent'").

Because *Armco* did not overrule clear past precedent nor decide a wholly new issue of first impression, it does not meet the first prong of the *Chevron Oil* test. *Armco* thus applies retroactively under either the rule advocated by the plurality or the rule advocated by the dissent in *American Trucking Assns., Inc.* v. *Smith*. Accordingly, the State Supreme Court of Appeals erred in declining to apply *Armco* retroactively to determine the constitutionality of the State's imposition of taxes on Ashland for the years at issue. The motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as *amicus curiae* is granted. We reverse the judgment, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.